EDITOR'S NOTE

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85-5571

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

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SUPREME COURT, U.S.

JAMES E. MESSER, JR.

Petitioner,

vs.

RALPH KEMP, Warden
Georgia Diagnostic and
Classification Center

Respondent.

ORIGINAL

Motion for Leave to Proceed in Forma Pauperis

The Petitioner, James E. Messer, Jr., who is presently incarcerated at the Georgia Diagnostic and Classification Center, a Georgia Prison, asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 46.

No affidavit is attached as the undersigned counsel has been appointed to represent Petitioner under the provisions of the Criminal Justice Act, 18 U.S.C. §3006A(d)(6).

Howard J. Manchel

101 Marietta Tower
Suite 3311
Atlanta, Georgia 30303
(404) 522-1701

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 84-8376

JAMES E. MESSER, JR.

Petitioner,

vs.

RALPH KEMP, Warden
Georgia Diagnostic and
Classification Center

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

HOWARD J. MANCHEL
Counsel for Petitioner

101 Marietta Tower
Suite 3311
Atlanta, Georgia 30303
(404) 522-1701

A. QUESTIONS PRESENTED FOR REVIEW

1. When does an attorney's ineffective assistance amount to an undermining of the adversarial process?

2. Can an appellate court rule that no reasonable probability of a different outcome exists at sentencing even if confronted with a breakdown of the adversarial process during the presentation of mitgation evidence?

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, James E. Messer, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of The United States Court of Appeals for the Eleventh Circuit entered in this proceeding on April 30, 1985.

OPINION BELOW

The opinion of the Court of Appeals, reported at 760 F.2d 1080 (C.A. 11, 1985) appears in the appendix hereto. Also to be found in the appendix is the opinion of the District Court rendered on March 30, 1984 and the opinion of the U.S. Magistrate rendered January 30, 1984, neither of which were reported.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 30, 1985; by a vote of two to one, the Court decided to uphold the lower court's decision affirming the death penalty. A timely motion for a rehearing en banc was denied on August 23, 1985, a majority of the judges in active service not voting in favor of it. On September 11, 1985, Circuit Judge Fay granted Petitioner's motion for a stay of the mandate pending petition of certiorari to and including October 7, 1985. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

James E. Messer, Jr. was convicted of murder and kidnapping his young niece in the Superior Court of Polk County, Georgia on February 8, 1980 and sentenced to death on the same day. Messer confessed during police interrogation a day after the child disappeared. Physical evidence gathered by police and supplied by Petitioner corroborated the confession. At the guilt-innocence phase of his trial, Petitioner offered no evidence because trial counsel's stated strategy was to present all mitigating evidence at the sentencing phase and thereby "humanize" Mr. Messer to the jury. However, at the penalty phase, trial counsel produced only the mother of Mr. Messer to testify and through direct examination, trial counsel solicited from her that both she and her son expected and accepted the death penalty. Finally, in closing argument, trial counsel, contrary to his stated strategy, failed to argue any evidence in mitigation to the jury and failed to advocate life for his client. Instead, he intimidated that in his opinion the balance of aggravating and mitigating circumstances favored the death penalty.

Counsel's examination of Petitioner's mother, statements as to trial strategy, preparation of Mrs. Messer for taking the stand and his closing arguments may be found in Sections D-H of the Appendix.

Procedural Posture

Petitioner's murder conviction was appealed to the Georgia Supreme Court which affirmed the conviction and death sentence, Messer vs. State, 247 Ga. 316, 276 S.E.2d 15 (1981). A timely

filed petition for writ of certiorari was denied by this court on October 5, 1981. Messer vs. Georgia, 102 S.Ct. 367 (Justices Brennan and Marshall dissenting).

Petitioner then filed a state habeas in the Superior Court of Butts County, State of Georgia. The requested relief was denied and the Georgia Supreme Court refused to grant an application for probable cause on April 20, 1982. Petitioner applied to this Court for certiorari which was denied on October 4, 1982 (Justices Brennan and Marshall dissenting).

Petitioner, on November 23, 1982, filed for a writ of habeas corpus before the United States District Court for the Northern District of Georgia, Rome Division. After evidentiary hearings, U.S. Magistrate Feldman issued a report and recommendation advising that the writ be granted as to the death sentence, but denied as to the conviction. See Section C of the Appendix.

However, on March 30, 1984, Judge Hall issued an order rejecting the Magistrate's recommendation and denied Petitioner a writ of habeas corpus on all grounds. See Section B of the Appendix.

The Eleventh Circuit, on April 30, 1985, through Judges Fay and Roney, affirmed the lower court. Circuit Judge Johnson dissented finding that the lower court erred in upholding the death penalty. Messer vs. Kemp, 760 F.2d 1080. Petitioner sought a rehearing en banc which was denied on August 23, 1985. Shortly thereafter, the Petitioner sought a stay of the mandate pending application for a writ of certiorari; said mandate was granted allowing Petitioner until October 7, 1985 to file for the writ with this Court. See Section A of the Appendix for a copy of the Eleventh Circuit's decision, denial of rehearing en banc and stay of the mandate.

REASONS FOR GRANTING WRIT

I. THE ELEVENTH CIRCUIT ERRED IN NOT RECOGNIZING THAT TRIAL COUNSEL'S CONDUCT COMPLETELY UNDERMINED THE PROPER FUNCTIONING OF THE ADVERSARIAL PROCESS

When an ineffective assistance of counsel claim is raised the ultimate question for the reviewing court to consider is whether the adversarial testing process worked to insure fundamental fairness to the defendant. Strickland vs. Washington, ____ U.S. ____, 104 S.Ct. 2052 at 2069. This Court should provide reviewing courts with guidelines as to what amounts to a breakdown in the adversarial process. All courts can recognize breakdowns caused by a denial of a right, i.e. right to cross examine or right to have counsel present. The problem of recognizing adversarial breakdown is much harder because the Sixth Amendment guarantee of counsel requires more than mere formal appointment or physical presence of counsel but not errorless counsel. Counsel must provide assistance "within the range of competence demanded of attorneys in a criminal case." McMann vs. Richardson, 397 U.S. 759 at 771 (1970).

This Court's precedents demonstrate that the Sixth Amendment guarantee requires counsel to discharge certain basic responsibilities in every criminal proceeding. One requirement of the Sixth Amendment is that an attorney pursue the defense as "an active advocate in behalf of his client." Anders vs. California, 386 U.S. 738, 744 (1967). Therefore, responsible, competent counsel must be an advocate, devoted to serving his client's interests vigorously in an adversary proceeding. The central issue in this petition is the recognition of when an advocate stops being an advocate and concedes his client's guilt and fate.

In the case at bar, the Eleventh Circuit mechanically applied the tests this Court set forth in Strickland vs. Washington at 2064 but unexplicably failed to review trial counsel's closing argument at sentencing. [1] Without considering the closing argument of trial counsel, it is impossible to conclude that the sentencing proceedings were fair because the result was reliable.

To understand Petitioner's complaint the appendix attached hereto contains trial counsel's closing argument at sentencing (Appendix G) and the guilt-innocence phase. (Appendix F.) Also included are portions of trial counsel's testimony at an evidentiary hearing (Appendix E) and his direct examination of Petitioner's mother (Appendix D).

At the evidentiary hearing, before a U.S. Magistrate, trial counsel John Sawhill testified that as the trial date approached he expected the jury to return a guilty verdict against Messer. The evidence against Petitioner included a confession, and a great amount of physical evidence to support the confession; therefore there were few possible defenses. Sawhill knew before trial that Messer's case would be the first capital case he handled which would reach the sentencing phase. His strategy was to appear "low-key" during the guilt-innocence portion of the trial and at the penalty phase present a "humane" picture of Messer to the jury. The intention was to convince the jury that James Messer was a person worth saving. In light of the overwhelming evidence of guilt, Petitioner does not contest Sawhill's choice of strategy.

Sawhill's effort to save Petitioner's life through a strategy of humanizing his client, began with his argument at the guilt-

---

[1] A Defendant must show that counsel's performance was deficient and that deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

innocence phase (Appendix F). In it Sawhill stated: "I don't think in a situation like this there's anything that I can say except to say thank God this is over."

"I dare say you've got five hundred years experience and there is not one bit that's seen anything like this before and I pray to God that none of you or myself, or other people in this courtroom, will ever see anything like this again."

These remarks may have been made to establish the jury's trust but only increased Petitioner's task of proving that mitigating factors outweighed aggravating circumstances, particularly because one statutory ground for sentencing someone to death in Georgia is O.C.G.A §17-10-30(b)(7) "whether the offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

Sawhill also conceded his client's guilt in the closing when he told the jury he agreed with what the prosecution said happened on the day of the murder. The jury's impression of this type of argument can only be surmized by a reviewing court. It does, however, reflect trial counsel's implied acceptance of the death penalty for his client and the hopelessness he felt in advocating for his client.

At the sentencing phase, Sawhill only presented one witness, Mrs. Messer, Petitioner's mother. She gave a rambling, sometimes incoherent narrative account of her life with her son. Her testimony did provide the jury with some mitigating evidence such as Petitioner's being raised by a father who beat him and eventually abandoned him and of Petitioner's grandfather shooting himself. This testimony depicts a man worthy of some sympathy. The record, however, contains affidavits from some 20 friends and former employees who state that they notified trial counsel of their

willingness to help but were never contacted. Additional mitigating evidence was crucial in this case because of the heinous nature of the crime, the overwhelming evidence of guilt, and because trial counsel's strategy was to humanize his client. How else could this be done than by presenting people who liked and knew him?

Because of his failure to present other witnesses in mitigation Sawhill never submitted to the jury that Messer had no prior arrest record, was honorably discharged from the service, attended church regularly, had a good employment record, and had a family of his own, including two children. By not providing this to the jury, Sawhill fostered a breakdown of the adversarial process at sentencing.

Besides his failure to call Messer's friends, neighbors and employers, Sawhill undermined Mrs. Messer, his only witness, when he solicited a statement from her that she and the Petitioner were reconciled to the death penalty. The appendix will demonstrate that the remark was not spontaneous or unexpected as the majority opinion contends. Trial counsel knew from past conversations with Mrs. Messer that she expected the death penalty for her son and warned her not to mention that she or her son anticipated or accepted the death penalty. But at trial while Mrs. Messer was giving her narrative he interrupted her on two occasions with a question that he could only have expected her to answer as she did:

> Q: Has Jimmy told you anything about what he expects is going to happen?
>
> A: Yes, Jimmy and I have talked consistently about it and he and I both, my sister, and my mother expect the death penalty here ... and since this happened ... Jimmy has got saved, he's confessed his sins to Christ, and he told me, he said, "Mama, the Lord has forgiven me ..."

Thus, because of Sawhill's question, his only witness in mitigation told the jury her opinion and the defendant's that a death sentence was expected and accepted. This is certainly an example of a breakdown in the adversarial process and in retrospect reveals Sawhill's acceptance of the death penalty for his client.

Sawhill's next failure to advocate for his client was his closing argument at sentencing. A review of it reflects an acceptance on his part that the jury would return a death sentence (Appendix G). In his argument, Sawhill fails to even mention Petitioner by name so how can the lower court say he effectively carried out a strategy of "humanizing" his client? Sawhill failed to mention anything in mitigation even the testimony given previously by Petitioner's mother. He failed to advocate for his client instead he intimated that he believed the balance of aggravating and mitigating circumstances yielded the death penalty when he stated:

> "(Your decision's) an awesome responsibility and I dare say I would rather be over here than in y'alls seats, because as a parent under these circumstances ... but that's for y'all to decide."

The argument of Sawhill does not humanize Mr. Messer and it does not help to win the jury's trust. To describe the argument as non-argument is to ignore the content of what was said, because when counsel makes reference to the fact that he's glad he's not in the jury's seats because he's a parent too, counsel is harming his client more than by making no argument.

Petitioner's advocate failed to advocate. For reasons only trial counsel will know he failed to perform his professional responsibility to the extent that the sentencing phase of this trial completely lacked an adversarial nature or content. There was no disagreement between parties for the jury to consider.

Incredibly, trial counsel failed to advocate that Mr. Messer did not deserve to die instead he advocated the opposite.

A review of the proceedings at the sentencing phase demands a finding that the adversarial system which Petitioner relied on to produce a just result failed because trial counsel was simply not prepared to represent his client at sentencing and gave up. Clearly, if counsel was denied Messer at the sentencing phase, this Court would hold that the trial was unfair. Judge Johnson in his minority opinion implied that Messer would have been better off without counsel; if that is true and the records supports his conclusion then the adversary process in this case has produced an unreliable result. If trial counsel fails to subject the prosecution's case to meaningful adversarial testing then there has been a denial of Sixth Amendment rights that makes the adversary system itself presumptively unreliable. U.S. vs. Cronic, ____ U.S. ____, 104 S.Ct. 2039 at 2047 (1984). To sanction the proceedings in the case at bar is to strip the Sixth Amendment of its meaning that the right to counsel is the right to effective assistance of counsel. McMann vs. Richardson, 397 U.S. 759 (1970). The basic purposes of the Sixth Amendment is to require more than mere formal appointment or physical presence of counsel. See Holloway vs. Arkansas, 435 U.S. 475, 489-90 (1978). Effective assistance includes zealous advocacy, a grasp of the law and facts pertinent to the sentencing issues and adequate investigation. Von Moltke vs. Gillies, 332 U.S. 708 at 721 (1945). Thus the lower court erred in not examining the case at bar to determine if the adversarial process had broken down, thereby depriving the Petitioner of fundamental fairness regardless of any presumption of reliability.

II. IF A PROCEEDING LACKS ADVERSARIAL TESTING BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL, SHOULD NOT THE TEST FOR PREJUDICE BE THE REASONABLE PROBABILITY OF A DIFFERENT RESULT RATHER THAN WHETHER THE DEFICIENT CONDUCT UNDER THE TOTALITY OF CIRCUMSTANCES, WOULD HAVE CHANGED THE OUTCOME?

This Court rejected the outcome-determinative test and the "more likely than not test" in Strickland vs. Washington at 2068, as ways for determining the test for prejudice:

> ... We believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case ...

Instead this Court set the test for prejudice as one in which:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland at 2068.

The majority opinion of the appellate court in the case at bar ruled:

> Even if we accept that some of Sawhill's specific actions fell outside the wide range of reasonable professional assistance, we nonetheless are convinced, under the totality of circumstances, they in no way affected the ultimate outcome of the guilt or sentencing phase of this trial.

Messer at 1092.

The majority decision reviewed Sawhill's errors and in light of the totality of circumstances of the case found that no single juror would have been convinced to spare Petitioner. The Court found that even if the jury had heard the following from Petitioner's friends, neighbors and employers that he would still have been sentenced to death:

1. Petitioner had no previous experience with the criminal justice system. He had a "clean" record.

2. Petitioner had a good work record.

3. Petitioner had a good military record serving in the U.S. Army as a helicopter mechanic.

4. Petitioner regularly attended church.

5. Petitioner had a high school education.

6. Petitioner grew up without his father being present and was raised by his mother, aunt and grandparents until his grandfather committed suicide when Petitioner was a young boy.

7. Petitioner was raised for the majority of his childhood by three women.

8. Petitioner had many close friends and was well liked in his hometown.

9. Petitioner, when confronted with his crime, suffered an emotional breakdown but cooperated with police.

10. Petitioner was married and had two children of his own.

The Eleventh Circuit's reasoning was that no single member of the jury panel of twelve would have been swayed by these twelve mitigating factors. But the simple truth is that the precise effect of mitigating information on a jury in a capital case is inherently indeterminable:

> The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> We cannot determine if other evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.

People vs. Hines, 390 P.2d 398, 402 (Cal. 1964) (emphasis in original). Accord People vs. Terry, 390 P.2d 381, 392 (Cal. 1964); Pickens vs. Lockhart, 714 F.2d at 1467-68.

More important, at least two judges, Judge Johnson of the Eleventh Circuit and Magistrate Feldman of the Northern District of Georgia, tacitly agree felt that jurors might be swayed by an effective advocate presenting any one of the stated mitigating factors, through proper argument or direct testimony.

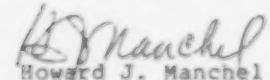
The lower court is being unreasonable in stating that no mitigating evidence would change any jurors mind. The Petitioner need only show a reasonable probability of change and Petitioner has satisfied this test. Therefore, the correctness of the decision below is open to serious question. The record shows quite plainly that substantial mitigating factors were present. The refusal of the Eleventh Circuit to respect these facts cannot be justified.

This Court has within its power to supervise the appellate courts under Rule 17 of the Rules of the Supreme Court. The panel's decision by the Eleventh Circuit has so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision and at the same time, summarily reverse the judgment below.

Respectfully submitted,



Howard J. Manchel
Attorney for Petitioner

101 Marietta Tower
Suite 3311
Atlanta, Georgia 30303
(404) 522-1701

James E. MESSER, Jr.,
Petitioner-Appellant,

v.

Ralph KEMP, Warden Georgia Diagnostic and Classification Center,
Respondent-Appellee.

No. 84-8376.

United States Court of Appeals,
Eleventh Circuit.

April 30, 1985.

Petitioner sought habeas corpus relief from state murder and kidnapping conviction. The United States District Court for the Northern District of Georgia, Robert H. Hall, J., denied relief, and petitioner appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) outburst by victim's father in presence of jury did not warrant mistrial; (2) petitioner was not denied effective assistance of counsel at either guilt-innocence phase or sentencing phase of trial; and (3) trial judge did not err in defining "bodily injury."

Affirmed.

Johnson, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐639

Because trial judge is in best position to evaluate prejudicial effect of a spectator's outburst, decision on whether to grant mistrial lies within his sound discretion.

2. Criminal Law ⇐659

Trial court did not abuse its discretion in refusing to grant defendant a mistrial on basis of outburst of murder victim's father, as the outburst was not calculated to influence the jury, but resulted merely from a bereaved father being unable to contain his emotions during a particularly lurid segment of the testimony, and curative instructions given by court were sufficient to counter any prejudice which might arguably have ensued.

3. Criminal Law ⇐641.13(1)

A defendant claiming ineffective assistance of counsel must overcome a strong presumption that his attorney's actions might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.13(1)

In reviewing performance of criminal defense attorney for effectiveness, every effort must be made to eliminate the distorting effects of hindsight. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.13(6)

That defense counsel did not object to any of the state's 53 items of physical evidence did not demonstrate that defendant was not afforded effective representation of counsel at innocence-guilt phase of trial, as counsel on numerous occasions examined witnesses on voir dire in attempt to find some weakness or legal imperfection on which to base just such an objection, and finding none, thereafter allowed evidence to come in before jury without challenge, and defendant failed to show that he was significantly prejudiced by counsel's failure to object. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.13(6)

A general observation that trial counsel failed to object to physical evidence

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[redacted]

does not in itself prove that counsel was ineffective.

7. Criminal Law ⇐641.13(6)

Defense counsel's cross-examination of only nine of prosecution's 23 witnesses did not demonstrate ineffective assistance of counsel, as that decision was a tactical one well within discretion of defense attorney, and, when cross-examination was warranted, counsel undertook it zealously and competently. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(2)

Failure of defense counsel to make opening argument was not ineffective assistance of counsel in view of counsel's stated strategy to use a low-key approach, maintain credibility with jury and then to present human side of his client during sentencing phase in hopes that jury would spare defendant's life, especially in light of fact that counsel accomplished during voir dire what most attorneys set out to do in their opening remarks.

9. Criminal Law ⇐641.13(2)

Record failed to show that defense counsel expressly conceded defendant's guilt during closing argument or abandoned defendant so as to constitute ineffective assistance of counsel at innocence-guilt phase. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(1)

Standard for determining effectiveness of counsel is same for both guilt and sentencing phase of trial. U.S.C.A. Const. Amend. 6.

11. Criminal Law ⇐641.13(7)

Defendant challenging death sentence on ground of ineffective assistance of counsel at sentencing phase must show that without the alleged error there is a reasonable probability that balance of aggravating and mitigating circumstances did not warrant death.

12. Criminal Law ⇐641.13(6)

An attorney's actions, including decision to put a particular character witness on the stand, are given great deference by the Court of Appeals in reviewing effectiveness of trial counsel.

13. Criminal Law ⇐641.13(7)

Defense counsel's decision not to put character witnesses on stand at sentencing phase of murder trial was not ineffective assistance of counsel, where counsel indicated that he had every intention of calling some of the witnesses, but that for the most part, they appeared reluctant to testify on defendant's behalf. U.S.C.A. Const. Amend. 6.

14. Criminal Law ⇐641.13(7)

That defendant's mother mentioned, during sentencing phase of trial, that her son was anticipating the death sentence, did not demonstrate ineffective assistance of counsel, where counsel had specifically instructed her not to mention that fact. U.S.C.A. Const.Amend. 6.

15. Criminal Law ⇐641.13(2)

Even if some of defense counsel's specific actions fell outside wide range of reasonable professional assistance, they in no way affected ultimate outcome of guilt or sentencing phase of trial in view of amount of direct evidence and defendant's confession to the crime. U.S.C.A. Const.Amend. 6.

16. Criminal Law ⇐770(3)

Trial court sufficiently charged jury on issue of bodily injury in prosecution for murder and kidnapping with bodily injury.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, FAY and JOHNSON, Circuit Judges.

FAY, Circuit Judge:

James Messer, Jr. was convicted of murder and kidnapping with bodily injury in the Superior Court of Polk County, Georgia on February 8, 1980, and was sentenced to death on both charges. On November 23, 1982, after exhausting his state remedies,[1] Messer filed a petition for writ of habeas corpus before the United States District Court for the Northern District of Georgia. The district court denied the petition and Messer appeals. On appeal, petitioner claims that (1) the trial court erred in not declaring a mistrial after an outburst by the victim's father in the presence of the jury, (2) he was denied effective assistance of counsel, and (3) the trial judge erred in not defining "bodily injury" in the jury charge as it pertains to the offense of kidnapping with bodily injury. After careful consideration, we affirm.

I. FACTS

On February 14, 1979, the half-nude, blood-spattered body of eight-year old Rhonda Tanner was found lying in the woods outside rural Cedartown, Georgia. There were six stab wounds to the body and five knife slashes traversing the victim's abdomen. The little girl's face, neck and upper chest were covered with numerous lacerations and abrasions. Massive bruises and swelling indicated that the little girl's head had been kicked and stomped. Swabs taken from the child's abdomen and vaginal area indicated the presence of sperm.

The following day, local police, along with state and federal agents, arrested the victim's uncle, James Messer, and charged him with the crime. Messer was subsequently indicted by the grand jury of Polk County during the November term of 1979, for kidnapping with bodily injury and for

1. Messer's conviction and sentence were affirmed by the Georgia Supreme Court on March 3, 1981, and a timely motion for rehearing was denied on March 18, 1981. Messer's petition for writ of certiorari before the United States Supreme Court was denied October 5, 1981.

Petitioner thereafter filed a writ of habeas corpus in the Superior Court of Butts County, Georgia and the requested relief was denied on February 23, 1982. On April 20, 1982, the Georgia Supreme Court refused Messer's application for probable cause, and on October 4, 1982, the United States Supreme Court denied Messer's petition for writ of certiorari. The Superior Court of Polk County thereafter entered an order setting Messer's execution date for November 30, 1982.

On November 23, 1982, petitioner filed a petition for writ of habeas corpus, along with an application for stay of execution, before the United States District Court for the Northern District of Georgia. On November 23, 1982, the stay was granted. An evidentiary hearing was then held, and on April 4, 1984, the stay was lifted. Execution was reset for May 8, 1984.

On April 30, 1984, in federal district court, Messer filed a notice of appeal, a request for certificate of probable cause to appeal a motion to stay execution, and a request to proceed in forma pauperis. A stay of execution was granted as was the request to proceed in forma pauperis. The request for certificate of probable cause to appeal was denied. On May 31, 1984, petitioner's application for certificate of probable cause was granted by this court.

the murder of Rhonda Tanner. A jury trial resulted in a guilty verdict against Messer on both charges. Messer was given the death penalty on both the murder and the kidnapping with bodily injury charge.

The facts adduced at trial paint a vivid picture of the events which transpired on that fateful day. Rhonda Tanner left her parents' home early on the morning of February 13, 1979, and boarded the bus which took her to College Street Elementary School in Cedartown. At approximately 2:30 p.m. that afternoon, Messer arrived at the grade school and told the principal, Sam Brabson, that Rhonda's father had been injured in an accident at work and that he was there to pick Rhonda up. Brabson summoned Rhonda from her classroom. When the little girl arrived at the principal's office, she quickly ran to her uncle's side and caressed his hand. Brabson, having no reason to suspect that anything was awry, allowed the child to leave with Messer.

When Rhonda did not get off the bus that afternoon, her mother became worried and drove to the elementary school to look for her. Mr. Brabson told Mrs. Tanner what had transpired earlier and described the individual who picked Rhonda up. Mrs. Tanner immediately contacted her mother-in-law who in turn notified the police and then called Messer's wife. Messer's wife stated that she knew of no reason why her husband would take Rhonda from school.

When Messer arrived home that evening, his wife and his sister-in-law, Pamela Dunn, were waiting for him. Ms. Dunn testified that Messer came in the door cursing and complaining about having spent the entire day at the doctor's office. He then went straight to the bathroom where he immediately changed clothes. In reference to Rhonda's disappearance, Ms. Dunn asked Messer what could be wrong with Rhonda, to which he replied, "I don't know and I don't give a damn." (T. at 243).

The following day, Ms. Dunn was driving down Old Mill Road when she spotted Rhonda's coat lying in some bushes near the railroad tracks. She notified the police and a search of the area was immediately undertaken. By this time, agents of the FBI and the GBI had joined in the investigation of Rhonda's disappearance. Later that afternoon, Rhonda's body was found in a secluded wooded area near the railroad tracks. Her books, pants, and panties were discovered nearby.

Throughout the day, law enforcement officials had been conducting interviews with various witnesses. Retha Wood, an employee at Barber's Service Company, told police that on the morning of Rhonda's disappearance, a man came into the store and inquired about light fixtures and supplies. Mrs. Wood, who was working alone at the store, told police that the man acted rather strangely and kept insisting that she go back to the storeroom to get the supplies he needed. She refused and then called her husband to come to the store. The man immediately left the store but returned later thinking that Mrs. Wood was alone. When Mr. Wood appeared from the back of the store, the stranger again left the premises. At approximately 2:30 p.m., Mrs. Wood saw this same individual drive by the store and look in the window. According to Mrs. Wood, he was heading in the direction of College Street Elementary School.

That night, Mrs. Wood called the police and reported what had happened. Subsequently, both Mr. and Mrs. Wood identified a photograph of Messer as the same man

who had been in the store on the day Rhonda disappeared. Even more importantly, the principal and two other witnesses from Rhonda's school had also selected Messer's photograph as being the man whom they saw pick Rhonda up. These witnesses further stated that on the day in question, Messer was wearing a red cap, blue jeans and a tan jacket.

On the evening of February 14, 1979, the day after Rhonda's disappearance, investigators went to a residence to question Messer. He agreed to accompany them to the Cedartown Police Station where he voluntarily gave a statement and signed a waiver permitting a search of his house. Messer was not under arrest at this time.

Initially Messer denied killing Rhonda, but when confronted with the fact that witnesses had identified him, he broke down crying and confessed to the murder. Messer stated that on February 13, 1979, he tried to pick up a female employee at Barber's Service Company. That attempt having failed, he drove to College Street Elementary School to get Rhonda. Messer claimed that when he picked Rhonda up at school, he planned to molest her, but not to kill her. He also confessed to telling the school's principal that Rhonda's father had been injured on the job in order to secure Rhonda's release.

Messer then left with Rhonda and drove down Old Mill Road to a secluded area near the railroad tracks. Messer stopped the car and the two of them walked into the woods together. Messer then began to molest Rhonda. When she resisted, Messer told investigators that he beat and stomped her head with his fists and shoes. Messer further stated that he stabbed Rhonda repeatedly and slashed her stomach. Although he denies having raped his victim, Messer did inform investigators that he masturbated at the scene. Messer concluded that he spent approximately thirty minutes in the woods before leaving. Following this confession, Messer was informed by the investigators that he was under arrest.

II. THE TRIAL

Following Messer's indictment, Attorney John Sawhill was appointed as counsel for the accused. Sawhill was the third attorney appointed by the court. The first two attorneys asked to be relieved and cited community pressure as the reason. On November 9, 1979, Messer entered his plea of not guilty.[2]

The evidence presented against Messer at trial was overwhelming. Mr. and Mrs. Wood had both picked Messer's picture out of a photo lineup as being the man loitering around Barber's Service Company on the day Rhonda disappeared. Mrs. Wood again identified Messer in court and related seeing the defendant driving in the direction of College Street Elementary School just minutes before Rhonda was picked up. In addition, the car which Mrs. Wood described and the license tag number which she wrote down were unquestionably that of the defendant.

Messer's photo was also selected from a lineup by Mr. Brabson, the school's principal, and by his secretary, Jane Hackney. Priscilla Lay, the mother of one of Rhon-

2. After his indictment, Messer entered a special plea of insanity. Two state doctors examined Messer and found him criminally responsible and mentally competent to stand trial. Defendant's motion for a private psychiatric exam was denied, after which the special plea of insanity was withdrawn.

da's classmates, also was present when the defendant picked Rhonda up and likewise selected Messer's picture out of a photo lineup. At trial, Brabson, Hackney and Lay all pointed to Messer and identified him as being the individual whom they saw take Rhonda Tanner from the College Street Elementary School on February 13, 1979. According to these witnesses, Rhonda took the defendant's hand, stroked it, and pranced about gleefully while she explained that she would not have to take the bus that day because her uncle was there to take her home.

The evidence revealed that Messer was spotted again approximately one hour later as he emerged alone from the woods near Old Mill Road. Robin Sides, a resident of nearby Rockmart, Georgia, was driving in her pickup truck down Old Mill Road at approximately 3:35 p.m. on February 13, 1979. She was on the way to pick up a friend. As she neared the railroad tracks, she noticed a car parked about 50 yards from the side of the road. Sides testified that she did not see anyone inside or near the car but that this did not strike her as being too unusual.

After picking up her friend, Sides turned her truck around and again proceeded down Old Mill Road. As the two girls approached the parked car, they noticed a man emerging from the woods near the railroad tracks. Sides stopped at the tracks to make sure that a train was not coming. Sides testified: "[H]e scared us both. I don't know . . . the way he looked, and . . . Lisa said 'you'd better leave,' and I told her . . . 'see what kind of car it is and get the tag number.'" (T. at 232-233). The two girls were unable to get the exact number, but they did notice that it was a Polk County plate. When the girls later learned that a murder victim had been found in that vicinity, they immediately related their experience to the police, who by now had begun to suspect Messer. The police drove the girls by Messer's parked automobile and they positively identified it as the one they had seen earlier on Old Mill Road. Moreover, the girls' description of the man whom they saw emerging from the woods was consistent with the descriptions provided by the other witnesses.

The physical and scientific evidence presented at trial was equally overwhelming. Messer knowingly and voluntarily consented to a search of his home. The investigators seized several articles of clothing which matched the descriptions given by witnesses. A footprint found at the scene of the murder was matched to a pair of bloodstained shoes found in Messer's home. Bloodstains found on a pair of Messer's jeans were typed and found to be type O, the same as the victim, Rhonda Tanner. Messer has type B blood. The bloodstains found on Messer's shoes were also analyzed but the quantity was insufficient for typing.

Experts also testified that hairs found on Messer's jeans were characteristically similar to samples removed from the victim's head. Similarly, hairs found at the murder scene were consistent with hairs taken from the defendant's head.

Of course the most incriminating piece of evidence in the state's arsenal is the confession itself. When confronted with the fact that several witnesses had selected his picture out of a photo lineup, Messer fell out of his chair crying and agreed to tell the investigators everything.

At trial, FBI Agent Robert Leary related for the jury Messer's own first-hand account of the murder. According to Leary,

Messer admitted trying to pick up a female employee at Barber's Supply Company. He likewise confessed to taking Rhonda from the school under the pretense that her father had been injured. Messer then told Leary that he drove to Old Mill Road, stopped his car, and told Rhonda that they had to go into the woods and find a rock to fix the car's battery. According to Leary, Messer then explained how he began to fondle Rhonda and remove her clothes. When Rhonda started crying, Messer hit her in the face with his fists, knocking her to the ground, and then he stomped and kicked her head. Messer told Leary that Rhonda kept crying, so he stabbed her repeatedly and then slashed her abdomen with his pocket knife. Finally, Messer told the agent that he removed his pants and masturbated over the child's lifeless body.

Agent Leary told the jury that he asked Messer whether he had raped his niece and that Messer responded that he didn't because he didn't want to hurt her. (T. at 371). Leary also explained to the jury that he had asked Messer several questions aimed at testing his story. These questions involved critical details which only the murderer would know, and according to Leary, Messer answered every question correctly.

In the course of this confession, Messer produced the pocket knife with which he murdered Rhonda Tanner. Expert testimony elicited at trial revealed that the victim's stab wounds were consistent with Messer's knife. In addition, blood stains were found on the knife, but the quantity detected was too small to be typed.

Messer also showed the investigators a bruise on his foot which he said he sustained while kicking Rhonda in the head. A photograph of the bruise was admitted at trial.

According to Agent Leary, Messer also drew a detailed map of the crime scene and then used it to outline his every move. This map accurately depicted the area where Rhonda's body was found and, according to Leary, his explanations were consistent with the evidence already compiled.

Finally, it was revealed at trial that Messer had also told the investigators of a pond where he had washed the blood from his knife and discarded his hat. Officers went to the pond and retrieved the hat described by Messer and the witnesses who saw him on the day in question. Expert testimony revealed that hairs found on the cap were characteristically similar to Messer's.

Simply put, if ever there was an open and shut case, this is it. Eyewitness testimony outlined Messer's every move. The physical evidence is uncontroverted and overwhelming. As far as the state is concerned, Messer's confession was simply icing on the cake.

III. REFUSAL TO DECLARE MISTRIAL

During the trial, FBI Agent Leary related for the jury Messer's own first-hand account of the gruesome murder. At one point, the agent's testimony was interrupted when Wayne Tanner, the father of the victim, lunged toward the defendant screaming and shouting. Messer's first argument is that the trial court erred in not declaring a mistrial as a result of this incident. We disagree.

The following excerpt from the trial transcript depicts the outburst:

AGENT LEARY: He said while they were walking down the railroad embankment Rhonda willingly accompanied him thinking that he was just looking for a rock. After he left the railroad track he went down into the woods a short distance and when he got to the point in the woods he told Rhonda that he wanted to play a game with her, he said at that point he started touching her, he said "down there in between her legs" and thereafter.... now, during this time I'm interviewing him he was crying and had his head in this [sic] hands and some of the statement was just disjointed, the next thing he talked about was that she was laying on the ground and crying. He said to stop her from crying he stabbed her in the chest several times with his knife. He said he couldn't remember the exact number of times he had stabbed her. I asked him did he cut her anywhere other than on the chest and he said he remembered slashing her abdomen with his knife. I asked him if he had or attempted to have sexual intercourse with her and he said no that he hadn't and he said that he didn't try to have intercourse with her because he didn't want to hurt her. I asked him if he took off his clothes ... (At this point and time the Court was disrupted by someone in the audience which was later identified as Mr. Tanner, the father of Rhonda Tanner, which was raging and lunging forward towards the Defendant, and at this time a State Trooper along with other officers seized Mr. Tanner).

MR. TANNER: "... He ... He'll pay! You're liable! ... you'll pay. You'll pay. You're liable. Oh! What you think ... oh you ... you're going to get it ... you....

THE COURT: Let the jury go out to the jury room.

(T. at 371–72).[3]

After the jury was removed, Sawhill immediately moved for a mistrial. The motion was denied and after curative instructions were given, the trial resumed. Sawhill renewed his motion several times throughout the course of the trial but each time it was again denied.

[1] Because the trial judge is in the best position to evaluate the prejudicial effect of a spectator's outburst, the decision on whether to grant a mistrial lies within his sound discretion. *See e.g., United States v. Brooks*, 670 F.2d 148, 152 (11th Cir.1982), *cert. denied*, 457 U.S. 1124, 102 S.Ct. 2943, 73 L.Ed.2d 1339 (1982). Absent

3. Following the outburst, the trial judge allowed Sawhill to recite for the record what he had observed in regard to the incident:

MR. SAWHILL: If I'm correct Your Honor, I believe as Agent, Special Agent Leary, was in fact going through his testimony concerning his interrogation of Mr. Messer. He testified that he asked the defendant at that time why it was that he hadn't had sexual intercourse with the deceased and the response that Agent Leary then followed up with, that the defendant had given him, was to the effect that the defendant did not want to hurt her. At that particular point Mr. Tanner, the deceased's father, sitting on the front row most nearest the jury box did in the manner of a distraught, upset and outraged father, come forward attempting to cross into the bar area yelling and screaming his intentions as to the defendant and having to be restrained at that time by police officers who was [sic] located at or about him. At that particular time people moving hither and yon and continuing to scream Mr. Tanner had to be removed from the court room. And in fact it was at that time that we took the recess. Does that accurately reflect what occurred?

THE COURT: I think that accurately reflects what occurred.

T. at 373–74).

an abuse of that discretion, this court will not intervene. *Id.* In the instant case, we find no such abuse.

[2] Our review of the record indicates that the trial court twice instructed the jury to disregard the outburst; once immediately after the outburst, and then again during the sentencing phase.[6] Both times the court inquired as to whether the outburst would in any way affect the jurors judgment, and both times the jury gave no indication that it would. (T. at 279 and 500). After the trial, during a hearing on the defendant's motion for a new trial, each individual juror was called as a witness and each testified that the outburst in no way affected their judgment. (R. Vol. 3 at 49–157). The majority of the jurors also stated that they did not recall any of the other jurors even mentioning the outburst during deliberations or at any other time. *Id.*

Appellant argues that the question of whether the jurors were influenced by the outburst is irrelevant. Messer cites *Collier v. State*, 116 Ga. 803, 42 S.E. 226 (1905), and *Glenn v. State*, 205 Ga. 32, 52 S.E.2d 319 (1949), for the proposition that the test is whether the outburst was *calculated* to influence the jury in their deliberations. While we agree with appellant that

6. Immediately after the outburst, the judge sent the jurors to the jury room and had Mr. Tanner removed from the courtroom. When the jurors returned, they were instructed as follows:

> THE COURT: Ladies and gentlemen of the jury the outburst which you observed during the testimony of Mr. Lewis, as you know because he testified in the beginning of the case was the father of the deceased child involved in this case. He was allowed to stay in the court room because he had requested to stay in the court room after his testimony. It is not unusual for family members to be allowed to see and observe a trial. From his testimony obviously he knows nothing about the facts that relate to any guilt or innocence of the defendant and his outburst should have no weight whatsoever with your determination as to the guilt or innocence of this defendant. You are to act only on the evidence as produced to you either by physical evidence or from sworn testimony from the stand and not from any outburst by a member of the family of any one who is deceased or is the recipient of a crime. Now I would like to know if there are any of you who feel this would in any manner bother you or affect you in acting as a juror under the instructions of the court at the end of this trial? Are there any who have any feelings whatsoever, and I want you to be very frank and candid with me on this. If you feel that it might in any manner affect your consideration of this case I would like for you to let me know.
>
> (No response from the jurors)
>
> THE COURT: I'm going to ask you then to disregard completely any passion or demonstrations shown by this father and I will charge you at the end of the case, but I now want you to determine that your verdict will not in any manner be affected by any outburst in the court room.
>
> (T. at 279–80).
>
> At the sentencing phase of the trial, the judge again cautioned the jurors in regard to the outburst:
>
> THE COURT: Ladies and gentlemen, having found the accused guilty it now would become your duty to fix the punishment for that offense and we would enter into the punishment phase now. In view of the outburst which occurred during the trial I asked you at that time if there was any problem in your mind, or any question in your mind, whether that outburst could affect your conduct as a juror concerning the guilt or innocence of the accused. In entering the punishment phase I now also would like to ask you if in any manner you feel that could affect you, or be any problem, or in any manner influence your conduct as a juror in the punishment phase of this trial. If you think it would please let let me know.
>
> (No response from the jurors).
>
> THE COURT: Again then I caution you that in no manner should anything other than the evidence and your own conscience, and the argument, and the charge of the court influence your verdict.

this is the applicable test under Georgia law, we simply do not believe that Wayne Tanner's actions were in any way motivated by a desire to influence the jury. Clearly this outburst, unfortunate as it was, resulted merely from a bereaved father being unable to contain his emotions during a particularly lurid segment of the testimony.

We agree with the trial judge, that the outburst was not calculated to influence the jury and that the curative instructions given by the court were sufficient to counter any prejudice which might arguably have ensued. As the jurors themselves repeatedly indicated, they were in no way influenced by the incident. Accordingly, we find no abuse of discretion on the part of the trial court in not granting defendant's motion for a mistrial.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

(1) *Argument*

Messer's position is that his attorney, John Sawhill, was ineffective throughout the trial and that he conceded guilt and separated himself from his client during the closing arguments. In addition, Messer claims that Sawhill failed to "humanize" him during the closing arguments of the sentencing phase and that he failed to present all available mitigating evidence. This performance, argues Messer, deprived him of his constitutionally guaranteed right to effective assistance of counsel.

(2) *Applicable Test*

In *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-part test for ineffective assistance of counsel. In applying that test, this court has noted:

> The *Washington* Court held that a claim of ineffective assistance of counsel has two components. *First*, a defendant must show that counsel's performance was deficient by identifying specific acts and omissions. Counsel's conduct, viewed as of the time of the actions taken, must have fallen outside of a wide range of reasonable professional assistance. In assessing a right to counsel's claim, an attorney's actions are strongly presumed to have fallen within that range, and a court must examine counsel's conduct without the use of judicial hindsight.
>
> *Second*, the defendant must show that the deficient performance was prejudicial. The *Washington* Court followed a standard that requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (citation omitted).... A defendant's failure to establish either the performance or the prejudice component results in denial of his Sixth Amendment claim.

King v. Strickland, 748 F.2d 1462, 1463 (11th Cir.1984).

[3, 4] Sawhill has stated that his strategy was to utilize a low-key approach, maintain his credibility with the jury, and then to attempt to humanize Messer during the sentencing phase in hopes that the jury would spare his life. In *Washington*, the Supreme court noted that there are countless ways to defend an individual accused of a crime and that "[e]ven the best criminal defense attorneys would not defend a

particular client in the same way." *Washington*, — U.S. at —, 104 S.Ct. at 2067, 80 L.Ed.2d at 695. Under the standard set forth in *Washington*, a defendant claiming ineffective assistance of counsel must overcome a strong presumption that his attorney's actions might be considered sound trial strategy. *Id.* at — - —, 104 S.Ct. at 2066-67, 80 L.Ed.2d at 694-95. The Court has further cautioned that in reviewing the performance of a criminal defense attorney, every effort must be made to "eliminate the distorting effects of hindsight." *Id.* at —, 104 S.Ct. at 2066, 80 L.Ed.2d at 694. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.*[5]

(3) *Innocence/Guilt Phase*

As support for his argument that trial counsel was ineffective throughout the trial, Messer sets forth a number of statistical observations. First, he notes that of the state's twenty-three witnesses, only nine were cross-examined. Messer further complains that Sawhill failed to object to even one of the state's fifty-three items of physical evidence. Petitioner implies that these statistics, in and of themselves, are sufficient to prove ineffective assistance of counsel. In addition, Messer asserts Sawhill's decision not to make an opening argument or present a case-in-chief as further proof of counsel's overall ineffectiveness.

[5, 6] We believe the statistics quoted by Messer do not paint a fair or accurate

(T. at 499-500).

5. Sawhill's closing argument at the guilt phase, in its entirety, is as follows:

> BY—MR. SAWHILL:
>
> Your Honor, ladies and gentlemen of the jury, I asked ya'll a lot of questions to begin with about what you were bringing in this court room in the way of knowledge, whether that would affect you in coming in and each and every one of you said it wouldn't and to that and I respectfully recognized each and every one of your responses.
>
> As to what the evidence has been I don't contend what the evidence is, I haven't said anything about it. I would be no less honest with each and every one of you if I tried to tell you the evidence said something other than what Mr. Sammons indicates occurred on that day so I'm not going to. Each and every one of you persons indicated to me that you'd be honest with me in coming into this court room and casting aside anything that you had heard previous to coming in here, it would have no effect on your verdict, no effect on how you looked at the defendant, no effect on how you looked at the evidence. I'm a parent too and I can't explain or give you some easy explanation for why so I won't try.
>
> The judge will charge you the law in this case and with that law that the judge charges you each and every one of you when you go into that jury room you take with you the evidence that's been received and render a verdict. A verdict that speaks the truth. I don't think in a situation like this there's anything that I can say except to say thank God this is over. I don't know what ya'll are going to believe brought this situation to happen. I have been with this matter nine months and I certainly can't suggest to you why or I'd get on the stand and tell you, I can't do that. At the moment I suggest to each and every one of you what you should do, this is your community and your court and laying aside everything except your common sense and experience, which I dare say there's probably five hundred years worth of it in this jury box right now, I dare say you've got five hundred years of common sense and experience and there is not one bit . . . not one bit that's seen anything like this before and I pray to God that none of you or myself, or the other people in this court room, will ever see anything like this again. I'm not going to be dishonest to ya'll and say something to change what is, the evidence is, what the evidence is, the law the judge gives you as to how to consider this evidence. That's all I have. Thank you.
>
> (T. at 482-484).

picture of the representation which he received. True, Sawhill did not object to any of the state's fifty-three items of physical evidence. This crude statistic, however, in no way reflects the numerous occasions on which Sawhill examined witnesses on voir dire in an attempt to find some weakness or legal imperfection on which to base just such an objection. Finding none, Sawhill thereafter allowed the evidence to come in before the jury without challenge. *Compare Solomon v. Kemp*, 735 F.2d 395, 402 (11th Cir.1984) (failure to object to evidence already ruled admissible does not render counsel ineffective). We do not find, and the petitioner has not directed us to, a single specific instance where Sawhill's failure to object to physical evidence in some way significantly prejudiced defendant's case. A general observation that trial counsel failed to object to physical evidence does not in itself prove that counsel was ineffective. The second prong of the *Washington* test requires some showing of prejudice as a result of counsel's omission. *Washington*, — U.S. at —, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. In regard to Sawhill's failure to object, Messer has made no such showing.

[7] Much the same can be said for Messer's complaint that Sawhill only cross-examined nine of the prosecution's twenty-three witnesses. Clearly this decision was a tactical one well within the discretion of a defense attorney. When cross-examination was warranted, Sawhill undertook it zealously and competently. Where the testimony appeared to be unrefuted and less critical, Sawhill apparently elected to forego cross-examination. It should also be noted that several witnesses were cross-examined out of the presence of the jury in hopes that something usable would be found. As previously stated, an attorney's actions are strongly presumed to have fallen within the wide range of reasonable professional assistance, *id.* at ——, 104 S.Ct. at 2065–66, 80 L.Ed.2d at 694–95; *King*, 748 F.2d at 1463, and Messer's general allegations in this respect are simply insufficient to overcome that presumption. Moreover, petitioner has not directed us to a single specific instance where cross-examination arguably could have affected the outcome of either the guilt or sentencing phase of the trial. Absent such a showing of prejudice, the second prong of the *Washington* test remains unsatisfied.

In regards to these statistical observations, we question whether they are even specific enough to satisfy the first prong of the *Washington* test. Assuming for the moment that the allegations do raise some question as to counsel's performance, it nonetheless is clear that petitioner has failed to direct us to any segment of the trial where a reasonable probability exists that, but for Sawhill's failure to object or cross-examine, the results of the trial would have been different. Consequently, petitioner's arguments fail to satisfy the second component of *Washington*.

[8] We next consider Messer's allegations that Sawhill's performance in regard to opening and closing arguments denied him effective assistance of counsel. Sawhill has stated that his strategy was to use a low-key approach, maintain credibility with the jury, and then to present the human side of his client during the sentencing phase in hopes that the jury would spare Messer's life. In light of Messer's confession and the overwhelming amount of evidence against him, we are not prepared to say that Sawhill's trial strategy was unwise. Sawhill's decision not to make an

opening statement is understandable in light of the fact that he accomplished during voir dire what most attorneys set out to do in their opening remarks. Furthermore, his decision not to present a case in chief is in keeping with his stated strategy, and *Messer* directs us to no evidence which Sawhill arguably could have presented to further his defense.

[9] In regard to closing arguments, Messer claims Sawhill conceded his guilt and separated himself from the accused. We have carefully reviewed Sawhill's closing argument and find no express concession of guilt, and nothing to support Messer's contention that he was abandoned by his counsel.[6] If guilt were to some degree implied in what Sawhill said, it was a weak implication at best, and arguably unavoidable in light of the overwhelming evidence and stated trial strategy. This situation differs markedly from the cases cited in appellant's brief where defense attorneys expressly conceded or strongly implied the guilt of their clients. *See Francis v. Spraggins*, 720 F.2d 1190, 1193 n. 7 (11th Cir.1983) (counsel stated during closing: "I think he went in the house and I think he committed the crime of murder probably ..."[7]; *Young v. Zant*, 677 F.2d 792, 797 n. 10 (11th Cir.1982) (counsel stated: "Under the evidence of this case, I only ask you for life."). In light of the totality of the evidence before the jury, we are simply unable to believe that the decision reached by the jury "would reasonably likely have been different absent the [alleged] errors" in Sawhill's closing argument. *Washington*, — U.S. at —, 104 S.Ct. at 2069, 80 L.Ed.2d at 699.

(4) Sentencing Phase

Messer's next argument regarding ineffective assistance relates to the sentencing phase of the trial. Messer claims Sawhill

6. *In Spraggins*, 720 F.2d at 1194-95, we cited with approval the Sixth Circuit case of *Wiley v. Sowders*, 647 F.2d 642 (6th Cir.), *cert. denied*, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981). In *Wiley*, the Sixth Circuit recognized that there is a distinction between a statement which constitutes a tactical retreat, and one which amounts to a "surrender of the sword." *Id.* at 649. As we noted in *Spraggins*, 720 F.2d at 1194 (emphasis added), it is a "*complete* concession of the defendant's guilt" which constitutes ineffective assistance of counsel. In our opinion, Sawhill's statements did not constitute a surrender of the sword, or a complete concession of guilt, and we therefore refuse to find him ineffective on these grounds.

7. Petitioner's argument is obviously based on that portion of the jury charge where the trial judge recited Ga.Code Ann. § 26-1311(a) (1968) (current version at O.C.G.A. § 16-5-40(a) (1984)), the Georgia Code section defining simple kidnapping. In instructing the jury, the judge stated:

> Code Section 26-1311, and following, defines kidnapping. A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and hold such person against his will. A person over the age of seventeen commits kidnapping when he forcibly, maliciously, or fraudulently leads, takes, or carries away, or decoys or entices away any child under the age of sixteen years against the will of the child's parents or other person having lawful custody.

(T. at 491).

Subsection (b) of that statute goes on to set forth the appropriate punishment where the kidnapping is accompanied by bodily injury. The pertinent part of subsection (b) is as follows:

> (b) A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years. ... Provided ... that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death.

Ga.Code Ann. § 26-1311(b) (1968) (current version at O.C.G.A. § 16-5-40(b)).

failed to present all available mitigating evidence and that the only witness which he did present, Messer's mother, was unprepared. Specifically, Messer contends that this lack of preparation resulted in his mother making a damning statement to the effect that Messer anticipated a death sentence. According to Messer, this overall failure by Sawhill to "humanize" him deprived him of effective assistance of counsel. We disagree.

[10, 11] The standard for determining ineffectiveness of counsel is the same for both the guilt and sentencing phase of a trial. *Id.* — U.S. at ——, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *King*, 748 F.2d at 1463. Accordingly, "[a] defendant challenging a death sentence must show that without the error there is a reasonable probability that 'the balance of aggravating and mitigating circumstances did not warrant death.'" *Id. (quoting Washington*, — U.S. at ——, 104 S.Ct. at 2068, 80 L.Ed.2d at 698).

[12, 13] Petitioner argues that there were several witnesses available who could have presented mitigating evidence had they been called to the stand. We note, however, that an attorney's actions, including his decision to put a particular character witness on the stand, is given great deference by this court. *King*, 748 F.2d at 1463; *Solomon*, 735 F.2d at 404. We have reviewed Sawhill's testimony from the state habeas proceeding. He thoroughly investigated Messer's background and was familiar with the mitigating evidence which was available. He was very much aware of the possible character witnesses and had spoken to most of them. Sawhill further indicated that he had every intention of calling some of these witnesses, but that for the most part, they appeared reluctant to testify on Messer's behalf. Faced with such a dilemma, we are not prepared to say that Sawhill's decision not to put these witnesses on the stand was unwarranted. *See id.* Even more importantly, we have reviewed the mitigating factors which were to have been introduced by these witnesses, and we find that they do not even begin to tip the balance of aggravating and mitigating circumstances in favor of Messer.

[14] We further find no merit to the allegation that Sawhill failed to prepare Messer's mother to testify. To the contrary, Sawhill stated that he discussed her testimony with her on several occasions, and that he decided that the best approach would be to allow her to testify in a narrative fashion. Sawhill further stated that he specifically instructed her not to mention that her son was anticipating the death sentence. We refuse to fault an attorney for the spontaneous exclamation of an emotional witness where the attorney has specifically instructed the witness to avoid that topic.

In applying the *Washington* standard to the sentencing phase, we find that Messer has asserted two specific acts or omissions aimed at proving Sawhill ineffective. As for the argument that there was additional mitigating evidence, we believe that Sawhill was justified in not presenting questionable character witnesses. The evidence indicates that these witnesses were somewhat reluctant to testify on Messer's behalf and it is doubtful whether their testimony would have in any way aided Messer. We further refuse to fault Sawhill for the unanticipated statement by Messer's mother regarding his anticipation of the death sentence. This clearly was not the result of Messer's mother being unprepared to

testify. In our opinion, petitioner has failed to show that Sawhill's performance during the sentencing phase was deficient to the extent that this court cannot rely on the result as being just. *See Washington*, — U.S. at ——–——, 104 S.Ct. at 2063-64, 80 L.Ed.2d at 692-93.

(5) *Conclusion*

[15] In order to prevail on an ineffective assistance claim, the second prong of the *Washington* test requires a showing that counsel's errors were so serious that the defendant was deprived of a fair trial. *Id.* at ——, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. As noted by the Supreme Court, however, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than a case of clear guilt supported by confessions and direct evidence. *Id.* at ——, 104 S.Ct. at 2069, 80 L.Ed.2d at 699; *see also King*, 748 F.2d at 1464. The instant case is clearly within the latter category, and consequently we recognize that petitioner must carry a substantial burden in trying to satisfy the second component of the *Washington* test. *See Boykins v. Wainwright*, 737 F.2d 1539, 1543 (11th Cir.1984). Even if we accept that some of Sawhill's specific actions fell outside the wide range of reasonable professional assistance, we nonetheless are convinced that, under the totality of the circumstances, they in no way affected the ultimate outcome of the guilt or sentencing phase of this trial. *See United States v. Gibbs*, 662 F.2d 728, 730 (11th Cir.1981). Accordingly, we hold that petitioner has failed to meet his "burden of showing that the decision reached would reasonably likely have been different absent the [alleged] errors." *Washington*, — U.S. at ——, 104 S.Ct. at 2069, 80 L.Ed.2d at 699.

V. JURY INSTRUCTIONS

[16] Petitioner's final argument is that the trial judge failed to define bodily injury in his jury charge and that the jury, having never been instructed on this essential element, could therefore not return a verdict for kidnapping with bodily injury. Messer thus contends that he was convicted only of simple kidnapping. If in fact the jury did render its verdict without the benefit of such an instruction, then arguably our decision in *Potts v. Zant*, 734 F.2d 526 (11th Cir.1984), would support petitioner's position. We have reviewed the instructions given, however, and conclude that the trial court did sufficiently charge the jury on the issue of bodily injury.

Petitioner's argument is apparently premised on that portion of the jury charge where the trial judge read verbatim the Georgia Code section which defines simple kidnapping.[8] Granted, if this was all that the jury was given, then arguably the instructions would be insufficient. At the beginning of his charge to the jury, however, the trial judge, in discussing the indictment, instructed the jury as follows:

> He is also charged in count two with the offense of kidnapping with bodily injury. That count alleges in substance that the accused did on February 13, 1979 in this county unlawfully forcibly maliciously and fraudulently lead, take, carry away,

8. Had we agreed with the argument that Messer was only convicted of simple kidnapping, counsel would next have us consider whether that finding rendered invalid any of the statutory aggravating circumstances relied on by the jury in imposing the death penalty. Having held that Messer was in fact convicted of kidnapping with bodily injury, we see no need to continue with a discussion of the second portion of petitioner's argument.

and entice away Rhonda Tanner a child under the age of sixteen years, the said accused being over the age of seventeen years, against the will of Mr. and Mrs. Wayne Tanner the child's parents, *and that the said accused did then and there inflict serious and grievous bodily injuries upon the said Rhonda Tanner, said injuries resulting in her death.*

(T. at 485). (emphasis added). We are of the opinion that this portion of the jury instruction was sufficient to fulfill the trial court's obligation to instruct the jury on this essential element of the crime charged. Clearly the term "bodily injury" is not a phrase which requires an elaborate explanation in order to be understood. We further note that this language serves to distinguish the instant case from *Potts*, where the trial judge never even mentioned the phrase "with bodily injury" in his instruction. *See Potts*, 734 F.2d at 530 n. 1.

Moreover, it is obvious that the jury was well aware that in regard to count two of the indictment, they were dealing with more than just simple kidnapping. The evidence clearly attests to that fact. In addition to being instructed on the nature of the kidnapping charge, it also appears that the jury had the indictment with them in the jury room during their deliberations. Count two of that indictment clearly states "KIDNAPPING WITH BODILY INJURY" and includes allegations "that the said accused did then and there inflict serious and grievous bodily injuries upon the said Rhonda Tanner, said injuries resulting in her death." (R. Index at 3–4). The jury returned a verdict finding Messer guilty of count two. In this respect, the instant case is markedly different from *Potts*, where the defendant was indicted for kidnapping with bodily injury, but the jury's verdict stated: "We, the jury, find the defendant guilty as to Count Three, *kidnapping*." *Potts*, 734 F.2d at 530. (emphasis added). In the instant case, there is not the ambiguity and uncertainty alluded to by this court in *Potts*, *see id.*, and therefore, we find that case distinguishable.

We therefore conclude that the jury was sufficiently instructed on all the essential elements of the crimes charged. Accordingly, petitioner was not denied due process in this respect.[9]

VI. CONCLUSION

Having reviewed petitioner's allegations, we conclude that the district court's denial of the petition for habeas corpus should be, and is hereby,

AFFIRMED.

JOHNSON, Circuit Judge, dissenting:

James Messer did not receive effective assistance of counsel at the sentencing phase of his trial. Messer's attorney, John Sawhill, knowingly prompted the sole witness on Messer's behalf to testify that Messer expected and was reconciled to receiving the death penalty. Then Sawhill told the jury in his final closing argument that he did not know what to say. He unmistakably implied that, as a parent under these circumstances, he too could accept a verdict directing the execution of his client.

9. Had we agreed with the argument that Messer was only convicted of simple kidnapping, counsel would next have us consider whether that finding rendered invalid any of the statutory aggravating circumstances relied on by the jury in imposing the death penalty. Having held that Messer was in fact convicted of kidnapping with bodily injury, we see no need to continue with a discussion of the second portion of petitioner's argument.

This conduct fell outside the "wide range of reasonable professional assistance" guaranteed by the Sixth Amendment, *see King v. Strickland*, 748 F.2d 1462, 1463 (11th Cir.1984), especially since Sawhill's trial strategy was to focus almost exclusively on the sentencing proceedings and the hope that one juror might find mitigating circumstances sufficient to outweigh the aggravating circumstances argued by the prosecution. When Sawhill finished his closing argument, not one advocate remained before the jury for the position that death was not deserved. In my view, Sawhill's conduct at the sentencing phase completely "undermined the proper functioning of the adversarial process," and therefore the sentencing proceedings "cannot be relied on as having produced a just result." *See Strickland v. Washington*, — U.S. ——, ——, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692-93 (1984). Accordingly, I dissent.

I. THE STANDARDS

The majority opinion has paraphrased generally the two-part test articulated in *Strickland v. Washington* for evaluating a claim of ineffective assistance of counsel. I accept the test as paraphrased but note emphatically at the outset what the Supreme Court described as "the ultimate focus of inquiry":

> [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, *supra*, — U.S. at ——, 104 S.Ct. at 2069, 80 L.Ed.2d at 699. In the present case, whether the sentencing proceedings were fundamentally unfair because they lacked adversarial testing is the critical issue.

In addition, the second part of the *Strickland v. Washington* test—the prejudice inquiry—deserves closer consideration than the majority has given it. The majority accurately relates the standard for prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at ——, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. The Supreme Court's careful wording of this standard is of crucial importance here. The likelihood of a different result at the sentencing phase need only be *reasonable*. Messer is not required to show that Sawhill's deficient conduct "more likely than not" altered the outcome in his case. *Id.* at ——, 104 S.Ct. at 2068, 80 L.Ed.2d at 697. As defined by the Supreme Court, the probability of a different result need only be "sufficient to undermine confidence in the outcome." *Id.* Having reviewed the record and, in particular, the transcript of the sentencing proceedings, which includes the testimony elicited from Messer's mother and Sawhill's closing argument, I conclude that a reasonable probability of a different result does exist. Unlike the majority, I cannot say with confidence that Sawhill's conduct "in no way affected" the outcome of the sentencing phase of the trial. To the contrary, it is reasonably likely that, had Sawhill's performance not been deficient, at least one of the twelve jurors would have weighed the aggravating and mitigating circumstances differently.

II. THE STRATEGY

Sawhill's testimony before the magistrate in the federal habeas proceedings below reveals that, as the trial date approached, he came to fully expect the jury to return a guilty verdict for his client. The evidence against Messer was overwhelming and the possible defenses few. Thus, Sawhill realized before trial that this would be his first case involving allegations of a capital crime to reach the sentencing phase. Sawhill chose to employ a "low-key approach" at the guilt-innocence phase and then attempt to present the "human side" of his client during the sentencing proceedings. The overriding purpose of this strategy was to convince the jury in the sentencing phase that mitigating circumstances outweighed whatever aggravating circumstances the jury might find. Given the overwhelming evidence of guilt, Sawhill's choice of strategy cannot be faulted. *See Warner v. Ford*, 752 F.2d 622, 625 (11th Cir.1985). His execution of that strategy, however, most certainly can.

III. THE EXECUTION

Sawhill's closing argument at the guilt-innocence phase—which itself comprised a complete breakdown of the adversarial process,[1] though one without the degree of prejudice required under *Strickland v. Washington*—had the unquestionable effect of consolidating all of Messer's defensive efforts into a single win-or-lose attempt at the sentencing phase to avoid the death penalty. It is most significant that this closing argument was made to the same jurors who shortly thereafter would determine Messer's fate. In light of this fact, I find it incomprehensible and certainly detrimental to his purported trial strate-

1. The majority distinguishes between a "tactical retreat" and a "complete concession" of the defendant's guilt, placing Sawhill's closing argument in the tactical retreat category. Similarly, the majority concludes that the closing argument contained no "express" concession of guilt and any implied concession was "arguably unavoidable."

Fairly speaking, these conclusions are incredible. Only moments after the State's attorney, Mr. Sammons, had argued that the evidence could leave no doubt in the jurors' minds that Messer had killed his niece, Sawhill flatly stated: "I would be no less honest with each and every one of you if I tried to tell you the evidence said something other than what Mr. Sammons indicates occurred on that day so I'm not going to." That, quite simply, was an express concession of guilt. It states affirmatively that only a guilty verdict could honestly be rendered. More importantly, this express concession was not "arguably unavoidable." Sawhill could have said nothing at all. His desire to show the jurors that he was being honest with them in no way required a concession of guilt at this stage of the proceedings. As I understand "prevailing professional norms," *see Strickland v. Washington, supra*, — U.S. at —, 104 S.Ct. at 2066, 80 L.Ed.2d at 695, Sawhill could reasonably have agreed with the guilty verdict, if at all, only *after* it had been returned. Furthermore, under the facts of this case, a trial strategy that mandates a concession of guilt before the jury even considers the question assumes that the jurors will not impartially perform the separate and distinct responsibilities assigned to them at the guilt-innocence and sentencing phases of the trial. In other words, such a strategy assumes that the jury will only find defense counsel credible at the sentencing phase if he previously conceded that his client was guilty. The proper assessment of claims of ineffective assistance cannot tolerate such an assumption. We must presume that the jury was "reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* at —, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

Nevertheless, the unreasonableness of Sawhill's closing argument at the guilt-innocence phase is alone an insufficient ground for reversal. I agree with the majority that, because the evidence of guilt in this case was overwhelming, Messer cannot establish prejudice. It is not reasonably likely that, had Sawhill not conceded guilt, the jury would have pronounced Messer innocent.

gy that Sawhill would emphasize the horror of the crime by making the following statements to the jury:

> I don't think in a situation like this there's anything that I can say except to say thank God this is over.
>
> . . . .
>
> I dare say you've got five hundred years of common sense and experience and there is not one bit . . . not one bit that's seen anything like this before and I pray to God that none of you or myself, or the other people in this courtroom, will ever see anything like this again.

These comments, under the asserted purpose of establishing the jury's trust, could only have increased Messer's burden of proving in the subsequent phase of the trial that mitigating circumstances outweighed aggravating circumstances. The unreasonableness of these statements is immediately evident when considered in conjunction with the fact that one of the foreseeable issues at sentencing was whether the offense was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim." O.C.G.A. § 17-10-30(b)(7). Therefore, although Sawhill's closing argument at the guilt-innocence phase does not alone justify reversal, it did adversely affect Messer's chance of receiving a life sentence in the later proceedings. Moreover, it foreshadowed Sawhill's own implied acceptance of the death penalty in his final closing argument at the sentencing phase.

The testimony elicited from Messer's mother during the sentencing proceedings was the only evidence submitted in his behalf. The mother's narrative account of her son's being beaten by a father who finally left them and his losing his grandfather to suicide poignantly implied a request for sympathy from the jury. Her description of Messer's struggles with his schoolwork and his later commitment to his jobs and his own family similarly paints a picture of a young man deserving pity. In these respects, Sawhill did ensure that at least some mitigating evidence was presented to the jury, though its substance was not corroborated by other witnesses.[1]

2. The record reflects some uncertainty as to whether every potential witness who volunteered to appear and testify in Messer's behalf was interviewed by defense counsel. The magistrate found that Sawhill contacted everyone whose name had been furnished to the defense. Yet the record contains affidavits from friends and former employers who state that they notified counsel of their willingness to help but were never contacted. The magistrate's opinion does not mention these affiants. The majority opinion concludes without elaboration that Sawhill spoke to "most" of the character witnesses who were available.

Mitigating evidence was especially important in this case, not simply because of the overwhelming evidence of guilt but because of "the attitude in the small rural county where the murder occurred." *Tyler v. Kemp*, 755 F.2d 741, 745 (11th Cir.1985). The community was outraged, and Sawhill encountered widespread reluctance even among family members to help in Messer's defense. Community pressures against assisting the defense were so pervasive that the two attorneys first appointed to represent Messer asked the trial court if they could be replaced. In these circumstances, the need for mitigating evidence is particularly great, and the attorney's duty to find such evidence and present it effectively increases in direct proportion. *Id.*

Messer had no prior arrest record and had been satisfactorily employed. These facts were neither presented nor argued to the jury as they should have been. *Id.* Messer's honorable service in the military was not mentioned. His church attendance and other religious activities could have been described in detail but were not. I offer no opinion as to whether Sawhill's failure to ensure the presentation of mitigating evidence such as this comprises, in itself, inef-

The effect of this evidence, however, was completely undermined when the mother answered Sawhill's final question with the statement that she and Messer expected and were reconciled to the death penalty. The statement was not "spontaneous" or "unexpected," as the majority contends. To the contrary, Sawhill knew from previous discussions with Messer's mother exactly how she would answer the question. Sawhill may have instructed her on prior occasions not to mention that Messer was anticipating the death penalty, but at trial he interrupted her narrative with a question that he could only have expected her to answer as she did:

> Q: Has Jimmy told you anything about what he expects is going to happen?
>
> A: Yes. Jimmy and I have talked consistently about it and he and I both, my sister, and my mother expect the death penalty here . . ., and since this has happened . . ., Jimmy has got saved, he's confessed his sins to Christ, and he told me, he said "mama, the Lord has forgiven me. . . ."

Thus, at the prompting of Messer's attorney, his only mitigating witness related both her opinion and his that the balance of aggravating and mitigating circumstances would yield a sentence of death. To have elicited such testimony was manifestly unreasonable.

Sawhill's closing argument at the sentencing phase reflected a similar reconciliation to the death penalty on his part. Described as a "nonargument" by the magistrate, and not even discussed by the majority, Sawhill's brief argument contained not one reference to the mitigating testimony previously given by Messer's mother. Instead, it focused on the awesome burden placed on the jury in determining Messer's fate and the fortitude that would be required of a juror to decide to let him live, as if the easiest and most obvious verdict were the death sentence. By all reasonable standards, Sawhill simply failed to advocate for his client:

> I dare say, and it has been suggested to me . . ., that I ought to argue to this jury to leave him alive is a more cruel punishment because he's got to live with it, so I don't know what to say to you. I really don't.

More importantly, Sawhill intimated that in his opinion as well the balance of aggravating and mitigating circumstances yielded the death penalty:

> [Your decision is] an awesome responsibility and I dare say I would rather be over here than in y'all's seats, because as a parent under these circumstances . . ., but that's for y'all to decide. [ellipsis in original]

Surely this conduct cannot be explained as a means of establishing the jury's trust. Nor did these statements purport to humanize Messer in any way that I can understand. Moreover, the statements do not comprise a "nonargument," for they were more damaging to Messer than no representation from Messer's mother concerning his past, which was vastly incomplete. *See King v. Strickland*, *supra*, 748 F.2d at 1463-64 ("attorney's failure to present available character witnesses in mitigation and his weak closing argument constituted both an unreasonable professional performance by the attorney and impermissible prejudice").

fective assistance of counsel. The absence of such evidence, however, most certainly contributed to the total breakdown of the adversarial process at the sentencing phase of the trial. After Messer's mother stated that she and her son were reconciled to the death sentence and Sawhill intimated a similar personal view, all the jury had left for mitigation was the testimo-

sentation at all. As previously held in *King v. Strickland*, *supra*, 748 F.2d at 1464, emphasis in closing argument at the sentencing phase on the reprehensible nature of the defendant's crime militates in favor of a finding of ineffective assistance. In my view, the harm caused by Sawhill's statements in this case is at least as great as that caused in *King*.

In sum, despite his acceptable choice of trial strategies in this case, Sawhill's conduct at the sentencing phase in "humanizing" his client faltered to such a degree that a complete breakdown in the adversarial process resulted. No one addressed the jury and said that Messer did not deserve to die. Incredibly, the testimony and closing argument in Messer's behalf implied just the opposite. Viewed in its entirety, then, Sawhill's conduct at the sentencing phase was clearly unreasonable. The total lack of adversarial testing undermines my confidence in the outcome. A reasonable probability exists that, given a proper adversarial proceeding, at least one juror would weigh aggravating and mitigating circumstances differently. Therefore, I would reverse the decision of the district court and remand for a new sentencing hearing.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 23 1985
SPENCER D. MERCER
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-8376

JAMES E. MESSER, JR.,

Petitioner-Appellant,

versus

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Georgia

(1985)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON, and CLARK, Circuit Judges.

O R D E R:

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 84-8376

US COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 11 1985
SPENCER D. MERCER
CLERK

JAMES E. MESSER, JR.,

Petitioner-Appellant,

versus

85-5571

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Respondent-Appellee.

- - - - - - - - - - - -

Appeal from the United States District Court for the
Northern District of Georgia

- - - - - - - - - - - -

O R D E R :

( ) The motion of appellant, James E. Messer, Jr., for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(✓) The motion of appellant, James E. Messer, Jr., for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including October 7, 1985, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

UNITED STATES CIRCUIT JUDGE

MDT-4
(Rev. 6/82)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JAMES E. MESSER, JR.,	:	
	:	
Applicant,	:	
	:	
vs.	:	CIVIL ACTION C82-419R
	:	
ROBERT FRANCIS, Warden,	:	
Georgia Diagnostic and	:	
Classification Center,	:	
	:	
Respondent.	:	

ORDER

The present habeas corpus action was transferred to this judge from another judge of this court on January 25, 1984. The Report and Recommendation of the Magistrate was entered February 1, 1984. In that Report, the Magistrate recommends that the writ of habeas corpus be denied as to the convictions, but granted as to the death sentences.

After carefully reviewing the Report and Recommendation, the court finds that it fails to address a number of issues raised in the Petition for Writ of Habeas Corpus and, for this reason, provides a discussion of those issues in this Order. As for the recommendations on the issues covered by the Report and Recommendation, the court partially adopts and partially rejects the Magistrate's recommendations, as explained below.

(Rev. 8/...

Discussion

A. Magistrate's Report and Recommendation

Of the issues addressed in the Report and Recommendation, only counsel's argument at the sentencing phase of the trial warrants the granting of the writ of habeas corpus in the Magistrate's opinion. (Report and Recommendation, pp. 50-52). In the Magistrate's words:

> [Petitioner's trial counsel's] argument did not go "far enough". Having reminded the jury that the question of whether the defendant would live was totally within its discretion, even though it might find the presence of statutory aggravating circumstances, he utterly failed to point out any matters which were favorable to the applicant - to "humanize" him, even though this was his alleged "tactic." Thus, the jury was reminded of no matters on which it could rely, justifying its extending a "hand of mercy". [Citations omitted] Under such circumstances, such nonargument must be characterized as so woefully inadequate as to have resulted in a deprivation of applicant's right to effective assistance, particularly when coupled with his failure to move for a continuance to obtain the testimony of other mitigating witnesses when the applicant refused to testify and his aunt failed to appear. [Footnote omitted].

(Report and Recommendation, pp. 51-52).[1]

The court finds that the Magistrate's analysis falls short in that it does not reach the question of whether "actual and

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[1] The closing argument given at the sentencing phase of the trial can be found on pages 516-519 of the trial transcript (Exhibit 1) introduced by the State).

substantial" prejudice resulted from the arguably ineffective closing argument. Washington v. Strickland, 693 F.2d 1243, 1258 (5th Cir. 1982), cert. granted, ____ U.S. ____, 103 S.Ct. 2451 (1983). Considering this question, the court concludes that in light of the overwhelming evidence of guilt and the totality of trial counsel's performance, "actual and substantial" prejudice did not result. Accordingly, the court rejects the Magistrate's recommendation to grant the writ of habeas corpus on the ineffective assistance ground.[2]

The court adopts the Magistrate's recommendations on all the other issues which he addresses.

B. Issues Not Discussed in the Report and Recommendation

1. Counsel's alleged failure to present an effective closing argument at the guilt/innocence phase.[3]

Petitioner argues that the closing argument at the guilt/innocence phase of the trial was "a total and complete failure to advocate for Petitioner" and rendered counsel's assistance constitutionality ineffective. (Petitioner's brief

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2 The court does not decide the issue of whether the argument was ineffective, relying instead on its finding of no substantial prejudice. Thus, the court does not attempt to apply the standard set forth in King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), and applied in Alvord v. Wainwright, No. 83-3345 (11th Cir. Feb. 10, 1984).

3 While the Magistrate discussed petitioner's challenge to the closing argument given at the sentencing phase, he apparently failed to consider petitioner's challenge to the closing argument presented at the guilt/innocence phase.

in support of Petition for Writ of Habeas Corpus, p. 27). Specifically, petitioner contends the argument was ineffective in the following ways: (1) counsel conceded that the evidence showed petitioner's guilt; (2) counsel failed to say anything on petitioner's behalf; (3) counsel suggested that the jury should render a verdict which would prevent anyone from seeing a similar incident occur; (4) counsel indirectly commented on petitioner's failure to testify; (5) counsel stressed the fact that he was a parent and could not explain why the killing had happened; and (6) counsel failed to mention petitioner's mental condition. (Brief in support of Petition, pp. 27-28).[4]

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[4] Among counsel's statements in his closing argument were the following:

> As to what the evidence has been I don't contend that the evidence is, I haven't said anything about it. I would be no less honest with each and every one of you if I tried to tell you the evidence said something other than what [the prosecutor] indicates occurred on that day so I'm not going to ... I'm a parent too and I can't explain why or give you some easy explanation for why so I won't try ... I don't think in a situation like this there's anything that I can say except to say thank God this is over ... I don't know what ya'll are going to believe brought this situation to happen. I have been with this matter nine months and I certainly can't suggest to you why or I'd get on the stand and tell you, I can't do that ... I pray to God that none of you or myself, or the other people in this court room, will ever see anything like this again ... I'm not going to be dishonest to ya'll and say something to change what is, the evidence is, what the evidence is, the law the judge gives you as to how to consider this evidence.

(Trial Transcript, pp. 482-484) (Exhibit II introduced by the State).

The question for the court is whether counsel's argument rendered his assistance at trial ineffective and, if so, whether this ineffectiveness caused "actual and substantial disadvantage" to petitioner's defense. Washington v. Strickland, supra, 693 F.2d at 1258. Considering the facts of this case, the court concludes that the argument did not render trial counsel's assistance ineffective. While counsel's argument was admittedly weak, it was not ineffective considering that defendant's confession had been introduced into evidence, defendant had exercised his right not to testify, no insanity defense was available, the evidence precluded arguing any other defense (such as provation, passion, or lack of intent), and the evidence against the defendant was overwhelming and devastating. Counsel's argument was not ineffective given the totality of the circumstances.

The court does not find that counsel's argument did "more harm than good," nor that counsel completely "separated himself from his client." Cf. King v. Strickland, 714 F.2d 1481, 1491 (11th Cir. 1983) (closing argument at sentencing phase of trial found constitutionally inadequate).[5]

Because counsel arguably conceded petitioner's guilt in his closing argument by stating that he did not contest the State's

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[5] For a discussion of petitioner's contention that counsel's argument was a comment on petitioner's failure to testify, see p. 13, infra.

version of the evidence (see footnote 3, supra), the court addresses two recent Eleventh Circuit cases in which the court held that counsel's concession of his client's guilt in the closing argument at the guilt/innocence phase of the trial deprived the petitioner of his right to effective assistance of counsel. Despite the literal language of the cases, the court does not feel that either mandates a finding of ineffective assistance of counsel in this case.

The first case, Young v. Zant, 677 F.2d 792 (11th Cir. 1982), involved a closing argument in which trial counsel conceded his client's guilt as to murder in the mistaken belief that such an action was necessary in order to make a strong plea of mercy, not aware that a bifurcated procedure was in effect.[6] Id. at 799. The court concluded that it could "discern no possible reason for [conceding the defendant's guilt] under the present bifurcated procedure" and that counsel's failure to inform himself of "basic Georgia criminal procedure" deprived the petitioner of his right to effective assistance of counsel in defending all the charges against him. Id. at 799-800 (emphasis in original).

In the second case, Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), the court likewise found ineffective assistance of counsel where trial counsel conceded petitioner's guilt as to

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6 The district court reported the trial counsel as saying during his closing argument: "Under the evidence of this case, I only ask you for life. I don't ask you for anything but life." Young v. Zant, 506 F. Supp. 274, 279 (M.D. Ga. 1980).

murder at the guilt/innocence phase of the trial.[7] Id. at 1194. In the court's view, "counsel not only failed to provide meaningful advocacy on the issue of guilt, but actually urged the jury to return a verdict of guilty." Id. The court explained why this was constitutionally ineffective:

> Where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel, though faced with strong evidence against his client,may not concede the issue guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury ... [C]ounsel does not have license to ... concede the issue [of guilt] during the guilt/innocence phase simply because an adverse verdict appears likely ... [C]ounsel's complete concession of the defendant's guilt nullifies his right to have the issue of his guilt or innocence presented to the jury as an adversarial issue and therefore constitutes ineffective assistance. [Citation omitted].

Id. The court restated its position expressed in Young v. Zant that it could "discern no possible reason for [conceding the

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[7] The closing argument contained the following statements:

> We know the deceased ... was killed and there is no question about that. And I think you have made up your minds about what happened and it is not necessary for me to go into it... I think [the defendant] is telling the truth when he says he doesn't remember going in the house. He told me that all the time, but I think he did, from the evidence that the State has put up, I think he went in the house and I think he committed the crime of murder probably... I'm not telling you to turn him loose. I'd like to see him in the penitentiary for the rest of his life because I know that he could have done this to a member of my family....

720 F.2d at 1193 n.7.

defendant's guilt] under the present bifurcated procedure." Id. at 1195 (quoting Young v. Zant).

The court is tempted to avoid the literal language of Young and Francis by distinguishing the present case from those cases on the ground that counsel in this case did not actually concede his client's guilt, saying only that he would not tell the jury that the evidence said something other than what the prosecutor described. (See footnote 3, supra). Thus, the argument at issue was not a blatant concession, unlike the arguments addressed in Young and Francis. However, in all intellectual honesty, the court must admit that, besides not providing a "meaningful advocacy on the issue of guilt," the closing argument in this case probably left the jury with the impression that counsel believed his client was guilty and, thus, is virtually indistinguishable from the arguments in Young and Francis. With such an admission, the court must reconcile its conclusion as to the effectiveness of the closing argument with the language of Young and Francis.

The court does this by concluding that the Eleventh Circuit did not intend to create an absolute rule to the effect that if counsel concedes the guilt of his client at the guilt/innocence phase of the trial, his assistance will be rendered constitutionally ineffective, regardless of the absence of other deficiencies in representation and regardless of the unavailability of defensive arguments. Such a rule would run counter to the well-established standard that in evaluating a claim of ineffec-

tive assistance, a court should undertake a "determination of whether reasonably effective assistance was rendered based upon the totality of the circumstances and the entire record." Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (emphasis in original). See also Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982).

The facts of both cases support the conclusion that the Eleventh Circuit considered the "totality of the circumstances" when it found ineffective assistance of counsel. In both cases the court observed that trial counsel failed to argue available defenses: in Young, the court stressed that counsel could have argued that defendant killed in the heat of passion and was guilty, if at all, of voluntary manslaughter, 677 F.2d at 799; in Francis, the court hinted that counsel could have asserted his client's denial of any involvement in the crime or urged acquittal on the ground of insanity. 720 F.2d at 1193. Thus, this court is convinced that counsel's concession of guilt combined with his failure to present available defenses is what lead the Eleventh Circuit to find ineffective assistance in both cases, not merely the concession of guilt.

With this interpretation of Young and Francis, the court does not feel compelled to find ineffective assistance of counsel in the present case. In this case, counsel did not fail to present available defenses; with the confession and the strength of the State's evidence, counsel had no defensive argument available to him. (See discussion supra, p. 5).

In conclusion, the closing argument at the guilt/innocence phase of the trial did not render counsel's assistance constitutionally ineffective. The court does not reach the prejudice prong of the ineffective assistance test.

2. Counsel's failure to make an opening statement.

Petitioner claims that counsel's failure to make an opening statement at the trial constitutes ineffective assistance of counsel. (Count Ten, subsection j, Petition for Writ of Habeas Corpus).

It is well established that "counsel will not be regarded constitutionally deficient merely because of tactical decisions." Ford v. Strickland, 696 F.2d 804, 820 (11th Cir. 1983). This is true even when in retrospect it appears that counsel made the wrong choice. Adams v. Balkcom, 688 F.2d 734, 738 (11th Cir. 1982). In order for tactical decisions to amount to ineffective assistance, they must be so ill-chosen as to render the trial fundamentally unfair. Id. at 745.

The decision to forego making an opening statement was tactical and did not render the trial "fundamentally unfair." Thus, the court does not find that counsel's failure to make an opening statement rendered his assistance constitutionally ineffective.

3. Counsel's failure to request a jury charge on petitioner's right to remain silent and his failure to object to the court's not charging on petitioner's right to remain silent.

Petitioner argues that trial counsel's failure to request a charge on petitioner's right to remain silent and his failure to object to the omission of such a charge in the court's instructions rendered counsel's assistance ineffective given that counsel made no opening statement, did not cross-examine many of the State's witnesses, did not object to any of the testimony presented on the State's behalf, presented no defensive evidence, and allowed six of the jurors to "entertain the notion that Petitioner would have to come forward and present evidence in order to prove his innocence." (Brief in support of Petition, pp. 33-34). The final act attributed to counsel refers to counsel's voir dire in which he asked several jurors whether they thought that defendant had to come forward with evidence to establish his innocence. The jurors who answered this question affirmatively were eventually excused.[8]

The court concludes that counsel's decision to not request a charge on petitioner's right to remain silent and his decision to not object to the court's omission of such a charge were tactical decisions. Counsel may have reasoned that giving such a charge would encourage the jury to draw an adverse inference; although this reasoning is arguably unsound, see Lakeside v. Oregon, 435 U.S. 333, 339-340, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), it was

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[8] The voir dire is contained on pages 17-145 of the trial transcript (Exhibit 11 introduced by the State). For an example of the line of questioning objected to, see pp. 119-121.

not so ill chosen as to render the trial fundamentally unfair. Adams v. Balkcom, supra, 688 F.2d at 745. The court agrees with the Magistrate's conclusion in the Report and Recommendation that the jury was not under the mistaken assumption that petitioner had to prove his innocence. (See Report and Recommendation, pp. 47-48). The logical extension of this is that the jury was also not under the assumption that petitioner's silence was evidence of his guilt.

4. Counsel's failure to challenge the charge of kidnapping with bodily harm with evidence that petitioner had authority to pick up his niece from school.

Petitioner asserts that his trial counsel was ineffective because he "failed to make any attempt to dispute the charge of kidnapping with bodily harm, where in a circumstance such as this whether defendant did in fact have the authority to pick up his niece was questionable." (Count two, paragraph e, Petition for Writ of Habeas Corpus). Petitioner supports his argument by saying that "[a] reading of the transcript reveals a close family with regular contact" and that "[c]ounsel failed to inquire into the elements of the crime or to dispute them in any way." Id.

The record indicates that trial counsel investigated the circumstances of the crime and there is no evidence that he failed to consider the authority element of the kidnapping

charge.[9] Furthermore, the evidence does not support petitioner's allegation of authority. The victim's mother testified that petitioner was not authorized to pick up her daughter. (Trial Transcript, p. 156) (Exhibit 11 introduced by the State). The court, accordingly, rejects petitioner's argument.

5. Counsel's alleged comment on petitioner's failure to testify.

Petitioner maintains that defense counsel commented on his failure to testify in the closing argument at the guilt/ innocence phase of the trial and that this created in the minds of the jury the idea that petitioner failed to meet his burden of proving his innocence, resulting in the denial of due process and effective assistance of counsel. (Brief in support of Petition, p. 27). The comment petitioner refers to is the following:

> I don't think in a situation like this there's anything to say except to say thank God this is over. I don't know what ya'll are going to believe brought this situation to happen. I have been with this matter for nine months and I certainly can't suguest to you why or I'd get on the stand and tell you, I can't do that.

(Trial transcript, p. 483) (Exhibit 11 introduced by the State).

The court does not find that this comment by counsel created the alleged presumption in the minds of the jury. It simply

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[9] Trial counsel testified about his pre-trial investigation in a hearing before the Magistrate. See, e.g., pp. 17-19 of transcript.

reflected counsel's frustration with the case. While it is true that only defendant could offer the "real" reason for his actions, and that counsel's statements could be taken as a comment on defendant's failure to do so, the court does not think that the average person would be left with that impression.

6. The trial court's alleged unfair restriction on petitioner's voir dire.

Petitioner contends in his Petition for Writ of Habeas Corpus that "the Court restricted Petitioner's voir dire, denying a request for individual voir dire and restricting counsel by not allowing questions on the jurors [sic] specific knowledge, despite their clear responses that they were familiar with the case." (Count Five, Paragraph d, Petition for Writ of Habeas Corpus). While it is not altogether clear, petitioner apparently feels that in light of substantial pre-trial publicity, such restriction on the voir dire constituted the denial of due process because it eventually led to the denial of the motion for change of venue.

The proper test for determining whether a prospective juror should be excused for being impartial is whether the juror "can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1960). The defendant must show the actual existence of an opinion in the mind of the juror such as to raise a presumption of impartiality. Id.

The record shows that each prospective juror was asked whether he or she would be able to put aside any prejudice arising out of the pre-trial publicity and render a verdict based on the evidence. (Trial transcript, pp. 17-145) (Exhibit 11 introduced by the State). Only four stated that they would not be able to and they were excused. Id.; Messer v. State, 247 Ga. 316, 322 (1981). Because the critical inquiry was asked, the court does not deem the restriction imposed on petitioner's voir dire unconstitutional.

7. The trial court's denial of funds for a private psychiatric examination.

Petitioner states in his Petition for Writ of Habeas Corpus that:

> Petitioner was denied his motion for an independent psychiatric examination and for funds to hire a psychiatrist or psychologist to serve as an expert witness. Said testimony would have been relevant in establishing whether Petitioner had the requisite capacity to commit the crime charged, providing mitigating circumstances and affording Petitioner a full defense and his rights to due process and equal protection of law. When the trial court denied Petitioner's motion for an independent or private psychiatric exam it was this constituted a denial to Petitioner of his right to a fair trial, right to effective assistance of counsel, right to present mitigating circumstances, right to a reliable non-arbitrary sentencing proceeding, and right to due process and equal protection of law....

(Count Fifteen, Petition for Writ of Habeas Corpus).

Under Georgia law, the appointment of an expert ordinarily was within the discretion of the trial court. Moore v. Zant, 722

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(Rev. 8/82)

F.2d 640, 648 (11th Cir. 1983) (citing Whitaker v. State, 246 Ga. 163 (1980)). Because petitioner was examined twice at Central State Hospital and petitioner has not presented any evidence to raise any doubts as to the reliability of these examinations, the court does not find that petitioner was unconstitutionally denied funds for a private psychiatric examination.

8. The alleged irrationality of the death penalty.

In his petition petitioner raises the claim that the death penalty fails to serve any rational and legitimate social interest. (Count Thirteen, Petition for Writ of Habeas Corpus). The court's only response is that such an argument is more appropriately addressed to the Georgia legislature; Georgia's death penalty has been declared constitutional. Gregg v. Georgia, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

CONCLUSION

In conclusion, the court DENIES petitioner a writ for habeas corpus on all grounds. The stay of execution ordered by this court is hereby LIFTED.

So ORDERED, this 30 day of March 1984.

Robert H. Hall
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JAMES E. MESSER, JR.,	)	
	)	
Applicant,	)	
	)	
v.	)	CIVIL ACTION NO. C82-4198
	)	
ROBERT FRANCIS, Warden Georgia Diagnostic and Classification Center,	)	
	)	
Respondent.	)	

MAGISTRATE'S REPORT AND RECOMMENDATION

INTRODUCTION

The applicant, presently under two death sentences imposed upon his convictions in the Superior Court of Polk County, Georgia, for the kidnapping (with bodily injury) and murder of his eight (8) year old niece, [1] contends that his convictions were obtained and sentences imposed in violation of his constitutional rights, as follows:

1. His confession, introduced into evidence over his objection, was unlawfully obtained as the "fruits" of his unlawful

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[1] The indictment, No. 2090 (superceding indictment No. 2072), is found at pp. 3-4, Respondent's Exhibit 16 (the record on appeal to the Georgia Supreme Court, hereinafter referred to as "R-16"). The verdicts and sentences appear at R-16, pp. 14, 80. See also Respondent's Exhibit 11 (the trial transcript, hereinafter referred to as "Tr."), pp. 528, 529.

[redacted]

APPENDIX C

arrest, and in violation of his Fourth, Fifth (and Fourteenth) Amendment rights (Ground One);

2. He was denied effective assistance of counsel in violation of his Sixth, Eighth (and Fourteenth) Amendment rights (Ground Two); [2]

3. He was denied his rights to a fair trial, in violation of the Fifth and Fourteenth Amendments,

a. When the trial court permitted the state to introduce evidence of other "acts" of sexual misconduct committed by him (Ground Three); [3]

b. When the trial court refused to grant his Motions for (1) a mistrial (Ground Four); [4] (2) a change of venue (Ground Five); and (3) for an independent psychiatric examination; and

c. When the trial court excused for cause a prospective juror who was conscientiously opposed to the death penalty (Ground Six);

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2 He enumerates 15 such instances, numbered "a" through "o."

3 Applicant's trial counsel voiced no objection to such testimony, and did not cite the introduction of such evidence, as an enumeration of error in applicant's direct appeal. See Part III of applicant's brief on direct appeal (Respondent's Exhibit 18). Applicant's present counsel cites such failure as an instance of ineffective assistance. See application, Ground Two (c), and state habeas corpus petition (Grounds 2(c)(d)), and 3. Respondent's Exhibits 17 and 18.

4 Applicant also contends that the trial court failed to instruct the jury after the incident precipitating the Motion for Mistrial occurred. Ground 7(c). As will be shown hereafter, this allegation is factually incorrect.

d. When the trial court improperly charged the jury (1) as to the material elements of the offenses (Grounds Seven (a) and (b), and Fourteen (i) regarding its imposition of the death penalty (Ground Eight). [5]

4. The Georgia Supreme Court's "proportionality" review violated his rights to due process, equal protection, and effective assistance of counsel (Grounds Nine, Eleven and Twelve).

5. The imposition of the death penalty constitutes cruel and unusual punishment (1) whether by electrocution (Ground Two); or (2) by any means (Ground Thirteen).

PART I. HISTORY OF THE CASE

A. THE CRIME AND ITS AFTERMATH

1. The Abduction

At about 2:30 p..m. on February 13, 1979, the applicant, James E. Messer, drove to the College Street Elementary School in Cedartown, Georgia. At that time, he knew that his eight year old niece, Rhonda Tanner, was enrolled there, and that her father (his brother-in-law) was a construction worker, working on a job out of town. He approached the school's principal, Sam Brabson, and advised him that Rhonda's father had been injured on the

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[5] Although he enu…erates 10 alleged deficiencies with respect thereto, some actually relate to whether the jury properly found a statutory aggravating circumstance present (e.g., ¶¶ (c)(i)), and others complain of the Appellate Court's affirmance of the death sentence (e.g., ¶¶ (d) and (e)).

out-of-town job, and that Rhonda's mother had asked him to bring Rhonda home from school.

Brabson summoned Rhonda from her homeroom and observed her affection for her "uncle," a scene also observed by his secretary, Jane Hackney, and a bystander, Priscilla Lay. Rhonda advised Ms. Hackney that she would be riding home with her uncle rather than on the bus. Hackney, in accordance with school policy, directed Rhonda to so advise her teacher, Helen Williams, and Rhonda did so. Apparently, because they knew that Rhonda was very shy around strangers and easily frightened, they permitted her to leave with her uncle without attempting to verify his story.

2. The Murder

After leaving the school building, the two got into James' car, an old, dirty, cluttered green Pontiac, bearing Georgia License Plate No. "RAP-779," and drove off.

Shortly thereafter, and after arriving at "the Old Mill Road," a secluded, wooded area, James lured Rhonda out of the vehicle and into the woods by a pretext. Over her objections, he removed her pants and underpants and began molesting her "between the legs." When she began to cry, he struck her several times in the face with his fist, apparently with such force that the blows tore the skin and connective tissue away from her skull; and, when she began crying louder, he took out his pocket knife, vi-

ciously stabbed her twice in the left chest (severing her pulmonary artery),[6] and slashed her five times across the abdomen. Unzipping his pants, he then masturbated on her; and then kicked her several times in the head and face, apparently with such force that the blows tore the connective tissue away from her mandible (over her jaw), dislocated one of her teeth, and bruised his own toe. He also apparently choked her around the neck with a great deal of force.

As Rhonda lay bleeding to death, he threw away his distinctive hat and washed off his knife and shoes; returned to his car, and drove off, discarding the coat and school books that Rhonda had left in the car. He then returned home, removed his clothing, including his bloody, muddy blue jeans and took a shower.

3. The Kidnapping Is Discovered

When Rhonda failed to arrive home on the school bus, her Mother, Joyce Tanner, became alarmed and immediately went to the school, where she was told by Brabson that Rhonda had left with her uncle. Based on Brabson's description, which fit her brother-in-law "to a 'T'," and knowing she had given no one permission to take Rhonda, she immediately drove to her mother-in-law's house, told her what had happened, and her mother-in-law immediately reported the incident to the Cedartown

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[6] The blows were apparently delivered with such force, that they penetrated to the knife's handle, which caused abrasions on the victim's chest adjacent to the entry wounds. (Tr. 465-466).

Police Department. The two then drove home, and Joyce called her sister, Peggy Messer, to ask if Peggy's husband, James (the applicant), had Rhonda. Peggy asked James, who replied in the negative; and Peggy relayed his answer to Joyce. Apparently Joyce advised Peggy that Rhonda had been abducted because Peggy told Joyce that she and James would be right over; for, when they arrived a short while later, James put his arm around Joyce and stated "I know how you feel sis." See also Tr. 242-243.

4. The Crimes Are Solved

The report of Rhonda's abduction resulted in the commencement of a joint state-federal investigation, involving FBI Agents Robert Leary, James C. Guess and Larry Firse; GBI Agents Jerry Longino and Vernon Kennon; Cedartown Police Officers John Dean and W. M. Moss, and others.

In the meantime, Rhonda's family members had instituted their own search for Rhonda; and, shortly thereafter, her mother's sister, Pamela Dunn (who was also Peggy's twin sister), together with her husband Larry, while en route on Old Mill Road from the applicant's residence to the home of other relatives, spotted Rhonda's coat hanging on a brush, and immediately reported the same to Officer Dean. Officers immediately converged on the scene and Rhonda's badly bruised, beaten, stabbed and slashed body, nude from the waist to her shoes, was soon discovered, and the search for her killer commenced.

One of the officer's first breaks came when Retha Wood, an employee of the Barber Service Company (located within two blocks of the school) reported to them on the evening of February 13, 1979, that she had observed a man acting suspiciously near the school at about 2:30, and had written down his automobile tag number. She also reported that the individual had unsuccessfully attempted to lure her into her employer's back room on two occasions earlier in the day, as well as once about three months previously. Indeed, his initial actions on the 13th had so alarmed her that she had summoned her husband from his job in an adjacent business; and he too had observed the individual on the latest occasion.

Another break came on February 14, 1979, when two women, Robin Joy Slides and Lisa Cox, observed officers at the crime scene, and reported that on the previous day at about 3:30 p.m., they had observed a dark green Pontiac parked on the side of the road near the murder site, and had observed an unshaven young man wearing a red cap, tan jacket and blue jeans, walk up to the car, get in, and drive away, which description of the individual and his vehicle corresponded with descriptions of the alleged perpetrator previously obtained. Shortly thereafter the women also personally identified applicant's distinctive car as the vehicle they had observed the previous day.

Based on the foregoing, the applicant became the officers'prime suspect. Accordingly, they paid him a visit and

asked if he would accompany them to the Cedartown Police Station and furnish a statement. Although he initially asked that the interview be deferred until after Rhonda's funeral, he nevertheless consented thereto when the officers told him that he was free to drive his own car and have his wife accompany him. [7] The group then drove to the police station.

After arriving at the station, the officers advised Messer that he was not under arrest and was free to leave. They also advised him that, even though he was not under arrest, they wanted to advise him of his Constitutional rights (i.e., his Miranda warnings). He then waived his "right" to counsel, agreed to be interviewed, signed consent forms for the search of his residence and automobile, and also consented to having his photograph taken.

Initially, the applicant denied any knowledge of the crimes. However, while the interview was in progress, a six (6) photograph "spread" was prepared and shown to the "school" eye-witnesses, Mrs. Wood, and the women who had been driving by the crime scene, and virtually all unhesitatingly picked out the applicant's photograph, which information was relayed to Leary as he conducted the interview.

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[7] The applicant granted FBI Agent Leary's request that he be permitted to ride with Messer and his wife to the station. Thus, Leary accompanied them in the Messer vehicle.

Thereafter, after Leary advised Messer that he had been so identified, the applicant admitted abducting Rhonda and killing her. Leary, although fairly positive that the perpetrator had been located, nevertheless wanted further verification. He therefore asked Messer a test question-to tell them where he had thrown Rhonda's shoes, (well knowing that the shoes had been found intact on Rhonda's body). When Messer replied that Rhonda's shoes had not been disturbed, Leary's satisfaction was complete: At that point, the applicant was formally placed under arrest.

B. POST ARREST - PRETRIAL MATTERS

1. Jury Challenges

On Monday, February 26, 1979, the February term Polk County Grand Jury returned an indictment charging the applicant with two capital offenses: murder and kidnapping with bodily harm. [8]

Two days after applicant's arrest on February 14, 1979, local attorneys E. Lamar Gammage and Joe Anderson, were appointed to represent him. R-4, 5 (p. 15). Among other matters done on the applicant's behalf, they filed, prior to the indictment's return, a challenge to the array of grand jurors which returned

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[8] This indictment, No. 2072, is not contained in the 25 exhibits submitted by respondent, and the foregoing has been "gleaned" from respondent's Exhibits 1 (p. 15), 2, 3, 4, 5 (p. 3) and 6 (pp. 6, 9-15). (hereinafter said exhibits will be referred to as "R".)

the indictment, requested that subpoenaes be issued for the jury commissioners, and moved for a continuance. [9] R-5 (p. 7).

On February 27, 1979, at about 11:00 a.m., they were notified that the trial court would consider the challenge at 1:30 p.m. At that time, they advised the Court that they were not ready to proceed, that, inter alia, they had just furnished the sheriff with the foregoing subpoenaes. In reply, the trial court, obviously displeased with the motion's filing, granted counsel additional time to prepare. R-5, (p. 11).

Apparently, sometime prior to May 22, 1979, the appointed attorneys requested that they be relieved - that they had arranged for applicant's family to employ another, more experienced attorney, John Sawhill, III. [10] A hearing was conducted to consider the request on May 22, 1979. At that time, the Court indicated it would make its determination at the next scheduled Court appearance, June 5, 1979; and, on that date, the motion was granted. R-3, 4. Thus, the action continued with Sawhill as applicant's counsel.

This motion became moot when the Polk County Jury Commissioners revised their county's grand and traverse jury lists. On November 5, 1979, the applicant was reindicted by the new grand

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[9] These motions and subpoenaes, likewise, have not been submitted to this Court, nor has their motion for a private psychiatric examination. R-1 (p. 4).

[10] In actuality, it appears as if Gammage and Anderson actually employed and paid Sawhill. Transcript of Evidentiary Hearing before the undersigned (hereinafter "EH") (pp. 4, 17).

jury. See Indictment No. 2090, R-16 (pp. 3-4). And, on November 9, 1979, the applicant again pleaded "not guilty". R-5. On November 6, 1979, Sawhill renewed the Motion. R-6 (p. 11), 16 (pp. 8-11).

On December 4, 1979, the renewed challenge to the array came on for hearing. However, based on his colloquy with the Court (and the judge who instructed the jury Commissioners and the new grand jury members [as to their duties]), and his own investigation, albeit limited, Sawhill withdrew the motions. R-6 (pp. 13-16), EH-78, 90. The Court then proceeded to hear the Motion for Change of Venue. R-6, 7, 16 (pp. 5-6, 37-43, 53-58).

2. Change of Venue

Applicant's November 6, 1979, Motion for Change of Venue was overruled on December 6, 1979. At that time, the Court advised applicant that he could renew the Motion after the voir dire. In reply, Sawhill requested that the prospective jurors be individually voir dired outside the panel's presence, which Motion was deferred by the trial court until the voir dire. R-7 (pp. 104-5). On January 30, 1983, Sawhill renewed the Motions, attaching thereto additional newspaper articles. R-11 (pp. 37-43, 48-52).

Applicant's renewed Motion was amended on the morning of trial with additional newspaper articles. R-16 (pp. 553-58). After denying the Motion to voir dire each prospective juror

outside of the panel's presence, the panel was voir dired, and six members thereof excused for cause. At the conclusion of the voir dire, the Court recessed for the day without applicant again renewing his Motion. On the following day, the jury was selected without the trial court having ruled on the renewed Motion for Change of Venue. R-11 (pp. 139-145).

3. Psychiatric Evaluations

Shortly after his arrest, the trial court entered an order that the applicant be psychiatrically evaluated at Central State Hospital. After he was admitted on March 10, 1979, the examination was conducted, and the results thereof mailed to the trial court on April 20, 1979. Based on the examination, the physicians concluded that the applicant was then sane and had been sane at the time the crime was committed. They likewise found that he was aware of the charges pending against him, the consequences thereof, and could assist his attorneys in the preparation of his defense. R-16 (p. 111) Notwithstanding that applicant's counsel filed a motion for funds to obtain a private psychiatric examination, a copy of which has apparently not been filed with this Court. This Motion was renewed by Sawhill on December 14, 1979, and a hearing thereon conducted on December 18, 1979 and January 8, 1980. R-7, 9, 16 (pp. 22-24). When it was denied on December 20, 1979, Sawhill filed a Motion for Reconsideration. Although the Court again denied the Motion, it ordered that applicant be re-examined at Central State Hospital.

The results on re-examination were identical, and the Court notified thereof on January 23, 1980. R-9, 16 (pp. 22-30, 112-113). Applicant's Special Plea of Insanity (also filed December 14, 1979), was withdrawn by Sawhill on January 28, 1980, for tactical reasons. EH-80-81, 91 R-16 (pp. 21, 34).

4. The Motions to Suppress Evidence

On December 14, 1979, Sawhill also filed Motions to Suppress Identification Testimony, and a Confession, and a Motion to view the photographs exhibited to prospective witnesses. R-16 (pp. 15, 17, 19). These Motions were initially considered by the Court at the December 18, 1979, hearing. The Court determined that the prosecutor had made the photographs available to Sawhill, and continued the hearing until January 8, 1980. On January 8, 1980, the Court determined that it would hear the Motions during the trial as part of a Jackson v. Denno proceeding. R-8, 10, 16 (p. 44).

C. THE TRIAL

The case was sounded for trial on February 4, 1980. At that time, Sawhill renewed his Motion for Change of Venue, as authorized by the trial court, and amended the same. He also renewed his request to individually voir dire prospective jurors outside of the presence of the panel. The trial court denied the request for "individual voir dire" and denied applicant's Motion for Change of Venue, but granted applicant the opportunity to renew

the same after completion of the voir dire. R-11 (pp. 6-14). During the course of the ensuing two-day voir dire, 49 prospective jurors were examined. Of these, only two indicated that they had not read or heard news accounts of the murder. Trial transcript (R-11) (hereinafter referred to as Tr.). (Tr. 34, 62). Of those who had read or heard news accounts, only three indicated that they had "prejudged" the case and could not be fair and impartial jurors. Based thereon, each was excused for cause (Tr. 29, 52), as were three other prospective jurors, who felt that the applicant was obliged to prove his innocence (Tr. 88, 108, 129) A sixth juror was excused for cause under Witherspoon (Tr-56).

In due course, the state "rested"; and the applicant rested without presenting any evidence. [11] (Tr. 475).

The jury convicted applicant of both offenses (Tr. 499), and the sentence hearing commenced. At the sentence hearing, the state presented no evidence, while the only evidence presented by the applicant was his mother's testimony. (Tr. 501-512). Again, Sawhill was assured of the concluding argument. [12] (Tr. 512). In due course the complained of death verdicts were returned. (Tr. 527-528).

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[11] This "trial tactic" insured applicant had both the opening, and more importantly, the closing arguments. O. Ga. C.A. §17-8-71 (former Ga. Code §27-2201). To be sure, Sawhill waived the opening argument.

[12] O.G.C.A. §17-10-2 (a, c), Ga. L. 1974, p. 352 (former Ga. Code Anno. §27-2503).

PART II. FINDINGS OF FACT

1. Although the applicant filed a state application for writ of habeas corpus, and presented some evidence regarding his claim of ineffective assistance of counsel, [13] he received no state evidentiary hearing, nor did the state habeas judge make any "Findings of Fact", from such evidence. Accordingly, there are none, other than at trial, which are deemed binding on the Court by virtue of 28 U.S.C. §2254. Consequently, this Court adopts as its first Finding of Fact the foregoing History of the Case, supra.

2. Counsel investigated the facts relating to the selection and empaneling of the new grand and traverse juries, and determined that constitutional procedures had been employed in the selection and empaneling steps. EH 18, 19, 78, 90-91.

3. Counsel met with the applicant over forty times, met with his mother, attempted to interview the victim's family, investigated the circumstances of the crimes, reviewed the prosecutor's file, the possibility of raising an insanity defense, (and in filing a special plea of insanity, and concluded that the same would be unsuccessful if filed.) EH 17, 18, 25, 30, 35-36,

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[13] Affidavits of persons who were allegedly available to present evidence in mitigation but who were either not interviewed or, if interviewed, were not called as witnesses. See pp. 7-8, Order on the State Application. R-17, 24.

76-86, 91-106, 113-116. He also conferred with a psychologist. EH 68-69, 85, 97-100, 103, 105.

4. Counsel investigated and interviewed those prospective witnesses in mitigation whose names had been furnished him, and made a tactical determination to limit such witnesses to the applicant, applicant's mother and applicant's Aunt Essie Messer, rejecting others for tactical reasons. [14] EH 45, 50-52, 54, 57, 58, 69-72, 88-89, 130, 141-144. At the presentence hearing, he was only able to call the applicant's mother because the applicant refused to testify, and Essie, although present earlier, failed to return to Court. EH 52, 72, 108-109.

5. Prior to calling her, counsel had met with applicant's mother on several occasions to prepare her to testify. EH 56-57, 130-134. Although he did not specifically tell her what to say about applicant's early years and similar matters he specifically told her not to tell the jury that she and the applicant were reconciled to his receiving the death penalty, and that they were prepared to accept such a judgment and sentence. EH 72-74, 86, 120-122.

PART III. CONCLUSIONS OF LAW

As previously mentioned, the applicant raises fifteen constitution errors. For the sake of continuity (and to the extent

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[14] He had also investigated the applicant's family history and background. EH-22, 42, 53-55, 63, 78, 86, 92, 106, 111-112, 131.

possible), they will be discussed in the order in which they allegedly occurred.

A. DENIAL OF APPLICANT'S MOTION FOR CHANGE OF VENUE DID NOT DEPRIVE APPLICANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

In support of his Motion for Change of Venue, applicant attached copies of various newspaper articles most of which were published at the time of the incident. They factually report the incident, applicant's arrest and subsequent indictment. After March 1979, the press accounts were few and isolated. In addition to the foregoing, at the hearing on the Motion applicant presented two witnesses who testified that, in their opinion, the applicant could not obtain a fair trial in Polk County. The State's four witnesses disagreed.

At voir dire, only two [15] prospective jurors of the 49 questioned indicated that they were unaware of any pretrial publicity, while most who admitted having read or heard news accounts indicated that such publicity had occurred almost one year previously. However, of those summoned, the Court was compelled to exclude five who indicated they could not be fair and impartial jurors.[16] Of these, only Perdue, Ostrander and McCullum indicated that their fixed opinion was based, at least in part, on press accounts. (Tr. 29, 108, 118-129. While two, Arencibia and

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[15] Hayes and Cooper. Tr. 34, 62.
[16] Perdue, Arencibia, Hartley, Ostrander and McCollum.

Hartley, gave no specific reasons as to why they had formed their opinions. (Tr. 56, 88)

Under such circumstances, this Court is compelled to conclude that the trial court's actions in denying the Motion were not unconstitutional. Compare Irvin v., Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6L.Ed.2d 751 (1961); Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031 44 L.Ed.2d 589 (1974); Brooks v. Francis, 716 F.2d 780 (11th Cir. 1983); Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983). This ground is without merit.

B. THE CONFESSION WAS NOT UNLAWFULLY OBTAINED

1. Fruits of an Illegal Arrest

It cannot be seriously disputed that the state has afforded applicant a "full and fair opportunity" to challenge whether his confession constituted "fruits of an illegal arrest".[17] See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) See also Taylor v. Alabama, _____U.S._____, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); compare Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), and United States v. Robinson, 690 F.2d 869 (11th Cir. 1982). Both the state trial court and the Georgia Supreme Court found that the applicant

[17] See Respondent's Exhibit 8; R-11 (pp. 179, 183, 285-328).

voluntarily accompanied the officers from his residence to the Cedartown Police Department, that he was not "in custody" when he confessed, and was not "arrested" until after he confessed. Under such circumstances, this Court is precluded from considering the issue further. See Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); Hance v., Zant, 696 F.2d 940, (11th Cir. 1983); Moore v. Zant, _____F.2d_____ (11th Cir. No. 82-8683, Dec. 20, 1983).

2. Waiver of Right to Counsel

Giving the state court's findings the presumption of validity to which they are entitled under 28 U.S.C.§2254(d) and Summer v. Mata (449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)). This Court is likewise compelled to find that the applicant validly waived his right to counsel and knowingly and intelligently confessed. [18] Hance v. Zant, ibid

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[18] To the extent such issue also involves a conclusion of law, this Court, likewise, agrees with the state court's determination -that the confession was voluntary. See Jurek v. Estelle, 623 F.2d 929, 931-32 (5th Cir. 1980) (en banc), cert. den. 450 U.S. 1001, 101 S.Ct. 1709, L.Ed.2d 203 (1981)

C. THE TRIAL COURT'S OTHER EVIDENTIARY RULINGS DID NOT DEPRIVE APPLICANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL

At the time she made an in-court identification of applicant as the person she had observed near the victim's school at the time of the abduction and the car he was driving, Mrs. Woods also testified that the applicant had entered Barber Service Company on two occasions earlier that day and once three months previously; and that his "suspicious" accions had frightened her to the extent that on the last occasion, she had asked her husband to come to the store, because the applicant "might try to get [her] ...to the back again." (Tr. 164-170, 199.) This evidence was introduced without objection or cross-examination. Compare Rule 803(1)(3) F.R.E.

Applicant's new counsel urges that the introduction of this evidence impermissibly placed applicant's "character" in issue in violation of former Ga. Code Ann. §38-202. (now O.G.C.A. §24-2-2). But see former Code §38-302 (now O.G.C.A. §24-3-2).

Federal Habeas Courts do not, however, sit as super State Supreme Courts for the correction of questions of state law. Meyer v. Estelle, 621 F.2d 769, 711 (5th Cir. 1980). Thus "the erroneous admission of prejudicial evidence can justify habeas

corpus relief only if it is 'material in the sense of a crucial, critical, highly significant factor.'" (cite omitted) Dickson v. Wainwright, 683 F.2d 348 (11th Cir. 1982), and results in a denial of fundamental fairness. Shaw v. Boney, 695 F.2d 528 (11th Cir. 1983); Jameson v. Wainwright, 719 F.2d 1125 (11th Cir. 1983).

Pretermitting the questions of whether the evidence was admissible or whether Sawhill's decision to raise no objection constituted a "waiver" within the meaning of Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), it is clear that, in light of the overwhelming evidence of applicant's guilt, the admission of such evidence, even if erroneous, was not a crucial, critical, highly significant factor which constituted a denial of fundamental fairness. Furthermore, the applicant admitted the same in his "confession." (Tr. 306, 367, 369) This ground, too, is without merit. Sullivan v. Wainwright, 695 F.2d 1306, 1312-1313 (11th Cir. 1983); Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983).

D. THE TRIAL COURT'S REFUSAL TO GRANT THE MOTION FOR MISTRIAL DID NOT DEPRIVE APPLICANT OF A FAIR TRIAL

Prior to the commencement of the trial, Sawhill, as well as the applicant's other attorneys, were fearful that the applicant might be killed or injured by the victim's family or townspeople. Indeed that concern was one of the bases on which they bottomed

their Motion for Change of Venue. Additional security matters had been taken to insure the defendant's safety during the course of the trial and Sawhill had even discussed the possibility of an outburst from the victim's father with the prosecutor prior to the commencement of the trial. On the Friday preceeding the trial's commencement, the prosecutor, Sawhill and the Judge met to discuss that possibility, the Rule of Sequestration which Sawhill intended to invoke, and the victim's father's request that he be permitted to remain in the courtroom after his testimony. At that time, the prosecutor assured Sawhill that he had counseled with Mr. Tanner and that no problem would be created were he to be allowed to remain in the courtroom after he had completed his testimony. (Tr. 372-374, 376, 380-381).

Sawhill's worst fears were realized when, during the course of FBI Agent Leary's testimony, Mr. Tanner (who had been permitted to remain in the courtroom after he testified) attempted to attack the applicant in the jury's presence, and screamed -

> "He. . . he'll pay! You're liable...you'll pay. You'll pay. You're liable. Oh! What you think...oh you...you're going to get it...you...".

At that point Tanner was forcibly restrained and removed from the courtroom. Sawhill appropriately immediately moved for a mistrial based on the foregoing incident. The Judge had the jury removed and the two attorneys argued the Motion outside of the jury's presence. The Court elected to temporarily defer

ruling on the Motion but determined that it was appropriate that he instruct the jury and release them for lunch. He had the jury return to the courtroom and he instructed them as follows:

> Ladies and gentlemen of the jury, the outburst which you observed during the testimony of Mr. Leary, as you know, because he testified in the beginning of the case was the father of the deceased child involved in this case. He was allowed to stay in the courtroom because he had requested to stay in the courtroom after his testimony. It is not unusual for family members to be allowed to see and observe a trial. From his testimony, obviously he knows nothing about the facts that relate to any guilt or innocence of the defendant and his outburst should have no weight, whatsoever, with your determination as to the guilt or innocence of this defendant. You are to act only on the evidence as produced to you either by physical evidence or from sworn testimony from the stand and not from any outburst by a member of the family of anyone who is deceased or is a recipient for the crime. Now I would like to know if there are any of you who feel this would in any manner bother you or affect you in acting as a juror under the instructions of the Court at the end of this trial? Are there any who have any feelings whatsoever, and I want you to be very frank and candid with me on this. If you feel that it might in any manner affect your consideration of this case, I would like for you to let me know.
>
> (No response from the jurors).
>
> I'm going to ask you then to disregard completely any passion or demonstration shown by this father and I will charge you at the end of the case, but I now want you to determine that your verdict will not in any manner be affected by any outburst in the courtroom.

> Now, we'll recess for lunch at this time and the bailiff will again take you to lunch ....". (Tr. 378-380).

After the lunch recess, Mr. Sawhill renewed his motion. The Court, concluding that its instructions to the jury were adequate and that no juror had replied to his inquiry, then overruled the Motion for Mistrial. (Tr. 382-383). Later, after the evidence had closed and counsel argued, the Court further charged the jury:

> "You are the judges of the law and the facts in this case. The facts you obtain from the evidence produced before you, the law you take from the Court as given you in charge by the Court. And any verdict that you may render in this case should be arrived at from the facts as you thus find them to be and applying that to the law as given you in charge by the Court." (Tr. 485-486)

It did not, however, specifically instruct the jury further regarding the outburst, although, it had indicated that it would do so at the "end" of the case. (Tr. 379). (In connection therewith, Sawhill had previously indicated, as a portion of his argument, that in his opinion, no curative action which the Court might undertake would be sufficient to adequately purge the incident from the jury's mind. He again renewed this Motion at the conclusion of the Court's first charge. (Tr. 375-376, 497-498).)

At the commencement of the penalty phase, the Court again questioned the jurors to ascertain their ability to continue to serve as follows:

> THE COURT: Ladies and gentlemen, having found the accused guilty it now would become your duty to fix the punishment for that offense and we would enter into the punishment phase now. In view of the outburst which occurred during the trial I asked you at that time if there was any problem in your mind, or any question in your mind, whether that outburst could affect your conduct as a juror concerning the guilt or innocence of the accused. In entering the punishment phase I now also would like to ask you if in any manner you feel that could affect you, or be any problem, or in any manner influence your conduct as a juror in the punishment phase of this trial. If you think it would please let me know.
>
> (No response from the jurors)
>
> THE COURT: Again then I caution you that in no manner should anything other than the evidence and your own conscience, and the argument, and the charge of the court influence your verdict. Before we begin into the punishment phase I'm going to let you return to the jury room for a short while and you will be notified when to come back into the court room. You may return to the jury room for now.

Thereafter, the Court instructed the jury that it was to reach its decision as to the sentences based on the evidence, and

not upon the passions or prejudices of the community [19]; and Sawhill again renewed his Motion. (Tr. 524-527).

In his Motion for New Trial, Sawhill raised, as the fourth ground thereof, the trial court's failure to grant the Motion for mistrial. R-16 (pp. 86-87). This Motion was initially considered by the trial court on April 8, 1980. R-13. The matter was continued, first until April 21, 1980, and then concluded on May 13, 1980. R-14, 15. During the April 21st proceeding, the defendant's mother testified that she was present in the restaurant on February 6, 1980, when the jury was brought in immediately after the outburst, and that she heard several persons in the restaurant discussing the incident in the jury's' presence. R-14 (pp. 12-13, 16-24). Based thereon, the trial court continued the matter for two weeks to permit the prosecutor to investigate the allegations.

During the ensuing two-week period, the prosecutor prepared affidavits for each of the jury members and furnished them to Agent Longino, instructing him to interview the witnesses and seek to obtain their signatures on the affidavits. Longino faithfully carried out his instructions and obtained the signatures, which matters were done without the knowledge o' the applicant or his attorney. R-15. At the May 13, 1980, hearing, Sawhill called each of the twelve jurors, the two bailiffs in whose custody they remained during the lunch recess and the offi-

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[19] This was Sawhill's requested instruction 11. R-16 (p. 70)

cer who had obtained the affidavits. In response to his questions, each of the jurors and the bailiffs indicated that no conversations concerning the outburst had been heard by them during the recess. Some of the jurors indicated that there was some short discussion among the jury members themselves regarding the outburst. While others indicated that no such discussion transpired.

The question of whether the applicant was denied his constitutional rights to a fair trial when the trial court overruled his Motion for Mistrial (and the Motion for New Trial) is a question of law. However, this Court also finds that during the course of the trial, and in connection with the hearings on the Motion for New Trial, the applicant was granted a full and fair opportunity to develop any additional facts necessary to the trial court's determination. Consequently, this Court is obliged to accept as correct the trial court's explicit and implicit factual findings. 28 U.S.C. §2254. Thus, this Court finds that the trial court determined at the time of trial that none of the jurors were so affected by the outburst that he or she could no longer serve as a juror, which finding is buttressed by each

juror's testimony at the time of the hearing on the Motion for New Trial. [20]

To say that the outburst was regretable is an understatement. It was made even more egregious by the trial court's apparent failure to act when it perceived Mr. Tanner's emotional state. This Court also concludes that, had the trial court granted the Motion for Mistrial, such would not have been inappropriate, and would not have prevented the applicant's retrial. Never heless from its review of the totality of the circumstances, this Court is compelled to conclude that the refusal to grant such Motion did not deprive the applicant of a fair trial. Compare United States v. Sanchez, _____F.2d_____(11th Cir. No. 81-5708, Jan. 16, 1984).

E. IMPOSITION OF THE DEATH PENALTY

1. Statutory Aggravating Circumstances

The indictment herein accused the applicant of committing two capital felonies; murder, and kidnapping with bodily injury

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[20] While this Court deems it inappropriate for the District Attorney to have caused each juror to be interviewed ex parte without notice to the applicant or his attorney, any such error was rendered harmless by the juror's subsequent testimony and the Court's order excluding the affidavits from its consideration, the Court having granted Sawhill's Motion to exclude the same. R-15 (pp. 161-162).

(in violation of former Ga. Code Sections 26-1101 [21], and 26-1311)[22] respectively and reads as follows:

> "The Grand Jurors...accuse James Messer, Jr. with the offense of MURDER for that the said accused...on (February 13, 1979)...did, then and there unlawfully and with force and arms and with malice aforethought, cause the death of RHONDA TANNER, by then and there stabbing the said Rhonda Tanner with a knife...
>
> COUNT TWO
>
> "And, the Grand Jurors...further...accuse the said JAMES MESSER, JR....with the offense of KIDNAPPING WITH BODILY INJURY, for that the said accused...did then and there, unlawfully, forcibly, maliciously and fraudulently lead, take, carry away and entice away RHONDA TANNER, a child under the age of 16 years, the said accused being over the age of 17 years, against the will of Mr. and Mrs. Wayne Tanner, the child's parents; and that the said accused did then and there inflict serious and grievous bodily injuries upon the said Rhonda Tanner, said injuries resulting in her death."

During its instructions to the jury, at the close of the guilt-innocence phase of the bifurcated trial, the trial court instructed the jury, inter alia:

> "Ladies and gentlemen of the jury, you've been trying the case of the state versus James Messer, Jr. charged with the offense of murder. This case was brought into Court by the return of a special presentment, or indictment, charging the accused with offense of murder and alleging in substance that on February 15th, 1979, he did in this count, unlawfully and with force and arms and with

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21 Now O.G.C.A. §16-5-1
22 Now O.G.C.A. §16-5-40

malice aforethought cause the death of Rhonda Tanner by...stabbing (her)...with a knife. He is also charged in count two with the offense of kidnapping with bodily injury. That count alleges in substance that the accused did on February 13, 1979...unlawfully forcibly maliciously and fraudulently lead, take, carry away and entice Rhonda Tanner, a child under the age of sixteen years, the said accused being over the age of seventeen years, against the will of [the child's parents]...and that the accused did then and there inflict serious and grievous bodily injuries upon the (child)..., said injuries resulting in her death." (Tr. 484-485).

* * *

"I charge you that every person is presumed to be of sound mind and discretion but that this presumption may be rebutted. I charge you that you may infer that the acts of a person of sound mind and discretion are the product of his will, and you may infer that a person of sound mind and discretion intends the natural and probable consequences of his act. Whether or not you make any such inference is a matter solely within the discretion of the jury. Intent is an essential element of any crime and must be proved by the state beyond a reasonable doubt. A person will not be presumed to act with criminal intent but the trier of facts, that is you the jury, may find such intention, or the absence thereof, upon a consideration of words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is being prosecuted.

"Code Section 26-1101 defines murder: A person commits murder when he unlawfully and with malice aforethought, either expressed or implied, causes the death of another human being. Expressed malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the cir-

cumstances show an abandoned and malignant heart.

"Code Section 26-1311, and following, defines kidnapping: A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will. A person over the age of seventeen commits kidnapping when he forcibly, maliciously or fraudulently leads, takes, or carries away, or decoys or entices away any child under the age of sixteen years against the will of the child's parents or other person having lawful custody. (Tr. 490-491).

* * *

"As I have charged you earlier criminal intent being an essential element of every crime it is a question of fact to be determined by you whether such criminal intent was present in the mind of the defendant at the time of the alleged crime, that is to say whether the defendant was mentally capable of such criminal intent and whether the defendant acted with such intent at the time of the alleged act or was mentally capable of distinguishing between right and wrong with reference to that act. The act itself may be so utterly senseless and abnormal as to furnish satisfactory proof of a diseased mind. In determining the issue of sanity or insanity the jury may consider the acts and mental condition of the accused as revealed by the evidence before and after the commission of the alleged offense, if any, and the declarations, if any, of the defendant made at the time of the alleged offense or reasonably close thereto as proof of his mental condition at the time of such alleged offense.

"The charge of the court should be received and considered by you in its entirety, as a whole, as one body of law applicable to this case. Such repetition as did occur during the progress of the charge did not take place

for the purpose of emphasizing the principle or principles of law repeated over other principles of law. Such repetition as did occur took place simply in order to enable the court to expound the law to you better as the charge progressed.

"After considering all of the case under the charge of the court if you have a reasonable doubt as to the guilt of the accused it is your duty to give him the benefit of that doubt and find him not guilty. In that event the form of your verdict would be 'we the jury find the defendant not guilty'. If you find the accused not guilty by reason of insanity the form of that verdict would be 'we the jury find the defendant not guilty by reason of insanity'. If you find the defendant guilty the form of that verdict is 'we the jury find the defendant guilty'. Each charge that I have given you would apply to both counts. You will need to find a verdict as to count one and also count two applying the law as I have given you to each count."

The form [23] of the blank verdict furnished the jury by the trial court reads, inter alia, as follows:

"COUNT TWO:

We the jury find the defendant not guilty.

* * *

We the jury find the defendant not guilty by reason of insanity.

* * *

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[23] See R-16 (p. 74).

We the jury find the defendant guilty. This day of February 1980.

_____
Foreman "

After the jury had found the applicant "guilty" as to each count, and after the evidence was closed and arguments presented during the sentencing phase, the Court further instructed the jury as to the punishments it was authorized to impose as to each count. [24] Its instruction is found at Tr. 522-526. It likewise furnished the jury a blank verdict form for its use, as well as its charge. See R-16 (pp. 75-79).

Applicant raises two arguments as to the procedures utilized to fix his punishment at death.

He first argues that he was convicted, not of capital kidnapping, but only non-capital (or simple kidnapping), basing his argument on the trial court's failure to specifically instruct the jury during the guilt-innocent phase, that a material element which it must find was proven beyond a reasonable doubt to support the "kidnapping with bodily injury" count, was the accused's infliction of a serious bodily injury upon the victim.

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[24] Georgia provides that the punishment for an accused convicted of murder is death or life imprisonment. Former Ga. Code §26-1101. It provides that the punishment for an accused convicted of kidnapping shall be up to twenty years imprisonment; provided, however, if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or death. Former Ga. Code Section 26-1311(b).

Consequently, he contends the maximum punishment for such conviction was twenty years imprisonment, rather than death.

He next argues that, since the jury did not find him guilty of "capital kidnapping", the trial court's instructions regarding one of the statutory aggravating circumstances (which the jury must find in order to justify its fixing his punishment at death) was fatally flawed: He could not have been engaged in the commission of another capital felony (capital kidnapping) while committing the murder.

At the onset, it must be recognized that Georgia's interpretation of its own statutes is binding on the federal courts. Ordinarily one such state law question involves an interpretation of the material elements of a criminal offense which the state is obliged to prove beyond a reasonable doubt. It must also be recognized that a portion of the court's instruction cannot be viewed in isolation, when considering the same for constitutional (or statutory) sufficiency: It must, rather, be viewed as a part of the overall charge. Cupp. v. Naughten, 414 U.S. 141, 146-147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); Lamb v. Jernigan, 683 F.2d 1332 (11th Cir. 1982) cert. den. _____U.S._____, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983); Corn v. Zant, 708 F.2d 549, 558-559 (11th Cir. 1983). Finally, it must be recognized that the jury's determination of a single valid statutory aggravating circumstance will sustain the death penalty, even if other findings are set aside. Zant v. Stephens,_____U.S._____, 103 S.Ct. 2733,

2749-50, 77 L.Ed.2d 235, 257-59 (1983); Dolbart v. Strickland, 718 F.2d 1518 (11th Cir. 1983).

Applicant is correct in observing that the trial court did not specifically instruct the jury that before it would be authorized to convict the applicant of capital kidnapping, it must find beyond a reasonable doubt that the accused had inflicted a serious bodily injury - death - upon the victim during the course of the kidnapping. Such observation, however, fails to consider the court's complete instructions, particularly those relating to the murder charge. In connection therewith, the Court instructed the jury that before it would be authorized to convict the applicant of murder, it must find beyond a reasonable doubt, that, with malice aforethought, the applicant caused the victim's death.

It appears that, inter alia, infliction of a serious bodily injury is a material element of the crime of capital kidnapping, in Georgia. Krist v. State, 227 Ga. 85, 179 S.E.2d 56, 59-60 (1970). The Court's entire charge included such element plus malice aforethought (as to the murder). It is, therefore, distinguishable from Potts v. Zant, N.D. Ga. (No. C80-1078A, Jan. 7, 1983, Moye, J.). Compare Presnell v. Ga.439 U.S. 14, 99 S.Ct. 235, 58 L.Ed2d 207 (1978).

Having concluded that the jury was properly instructed on the elements of capital kidnapping (when the Court's entire

charge is considered), its verdict, finding the applicant "guilty", resulted in his conviction of capital kidnapping. This determination, likewise, properly served as a statutory aggravating circumstance to support its verdict fixing applicant's punishment at death for the murder.

In his "third" issue briefed applicant contends that two of the statutory aggravating circumstances used to support his death sentence were invalid. He fails, however, to articulate which other statutory aggravating circumstance he deems "invalid", although he indicates that the three statutory aggravating circumstances found were:

> (1) the murder was committed while the applicant was engaged in committing another capital felony -kidnapping with bodily injury;
>
> (2) and, as to the kidnapping with bodily injury conviction, the murder was outrageously or wantonly vile, horrible or inhuman;
>
> (3) the capital kidnapping was outrageously or wantonly vile, horrible or inhuman.

pp. 14, 15 of applicant's brief filed January 24, 1983.

He has again failed to recite all of the facts: The jury fixed applicant's punishment at death for the murder because it found:

> (a) the murder was committed while the applicant was engaged in the commission of another capital felony, viz kidnapping with bodily injury; and,

(b) the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture to the victim.

It fixed his punishment at death for the capital kidnapping because it found that the same was outrageously or wantonly vile or inhuman in that it involved torture to the victim, an aggravated battery to the victim. R-16 (p. 79) [25]

Presumably, he contends that the trial court's failure to define what was meant by the terms "torture" and "depravity of mind" rendered the jury's determination, as to the presence of torture, unconstitutional. [26] See "issue seven", pp. 53-55 of applicant's brief, supra. The word "torture", like the term "bodily injury" is not a "term of art": it is, rather, a commonly understood word which requires no further elaboration. Thus, the jury's finding regarding its presence was not unconstitutional. Compare Smith v. State, 236 Ga. 5, 222 S.E.2d 357, 361 (1976).

He also argues that the trial court improperly failed to (1) advise the jury that, in determining whether to fix applicant's punishment at life imprisonment, it was obliged to consider any

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[25] The statutory aggravating circumstances which the sentencing authority must find in order to authorize its fixing punishment at death are enumerated in former Ga.Code §27-2534.1 (now O.G.C.A. §17-10-30). In its instructions to the jury, the Court enumerated additional statutory aggravating circumstances which were available for the jury's consideration in fixing applicant's punishment.

[26] He recognizes that the Court defined "aggravated battery" which was found by the jury as present when it fixed applicant's punishment for the capital kidnapping. (Tr. 522)

mitigating evidence presented during the guilt-innocent phase, as well as the punishment phase; and (2) adequately define the meaning of "mitigating circumstances". "Issue seven", pp. 55-57, applicant's brief, supra. As to the former, the allegation is factually incorrect: the trial court instructed the jury as follows:

> "Mitigating circumstances are those which do not constitute justification or excuse for the offense in question but which in fairness and in mercy may be considered as extenuating or reducing the degree of moral culpability. I charge you that specific mitigating circumstances need not be singled out by the Court in order that you consider that they have been introduced on behalf of the defendant. It is your responsibility to consider all of the evidence submitted realizing that under Georgia law a jury may recommend a life sentence even though there are no mitigating circumstances found. (Tr. 520-521.
>
> * * *
>
> "In arriving at your verdict in this case, you will consider the evidence as to the mitigating circumstances which the defendant contends exist in this case including any other mitigating circumstances you find from the evidence." (Tr. 522-523)

As to the latter, this Court is compelled to conclude that the instructions given were constitutionally adequate. Furthermore, while it would not have been inappropriate for the Court to illustrate "mitigating circumstances" with examples, such instructions create another risk-that the jury might infer that the absence of such examples meant that none may have been present.

Compare Collier v. Montgomery, C80-90R (N.D. Ga. Mar. 31, 1982, Murphy, J.).

More importantly, the Georgia scheme does not require that the sentencing authority weigh aggravating circumstances against mitigating circumstances in arriving at its decision as do certain other jurisdictions: In Georgia, the sentencing authority is authorized to fix an accused's punishment at life imprisonment even if it determines that no mitigating circumstances have been presented, and that statutory aggravating circumstances are present.

2. Death by electrocution

Applicant contends that the imposition of capital punishment through the method of electrocution constitutes cruel and unusual punishment. The Supreme Court and this Circuit have ruled otherwise. Gregg v. Georgia, 428 U.S. 153. 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Sullivan v. Dugger, ____F.2d____(11th Cir. No. 83-3696, Nov. 30, 1983) (see also Sullivan v. Wainwright, ____U.S.____, ____S.Ct.____, ____L.Ed.2d____(No. A-409, Nov. 29, 1983) 34 C.L. 4111); Spinkellink v. Wainwright, 578 F.2d 586, 616 (5th Cir. 1978).

While it may be abstractly argued that the infliction of death through administration of a lethal injection may be more humane (and the State of Georgia is free to adopt such a method), it cannot be said that death by electrocution involves the gra-

tuitous infliction of pain within the meaning of the Eighth Amendment. This ground is likewise without merit.

3. Arbitrary, Capricious, Discriminatory Application of the Death Penalty

Applicant, who is white, contends that the imposition of the death penalty upon him constitutes arbitrary, capricious and discriminatory state action as condemned by the Supreme Court in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1973). See also Gregg v. Georgia, supra. His allegation is purportedly based on a study which indicates that the state imposes the death penalty on persons who kill caucasians in greater percentages than it does on those who will noncaucasians. He has failed, however, to introduce either the study or any other evidence supporting his allegation.

At the present time, the Eleventh Circuit presently has a corollary of this issue under review--whether the death penalty is being arbitrarily applied against blacks. See Spencer v. Zant,_____F.2d_____(11th Cir. No. 82-8408, Dec. 13, 1983) (granting rehearing en banc); Stephens v. Kemp,_____F.2d_____(11th Cir. No. 83-8844, Dec. 11, 1983) reh. den. Dec. 13, 1983, stay granted_____U.S._____, _____S.Ct._____, _____L.Ed.2d_____(A-455, Dec. 13, 1983) 52 L.W. 3530; Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983). Compare Willis v. Zant, _____F.2d_____(11th Cir. No. 82-8677, Nov. 17, 1983). It is clear, however, that Spencer will

not control this case; and the single "fact" that the killers of whites are sentenced to death in greater proportions than the killers of blacks, even if true, fails to make out a case of discriminatory application of the death penalty. The ground is without merit.

4. Appellate Review

Without introducing any evidence applicant also challenges the procedures utilized by the Georgia Supreme Court in reviewing his death sentences (i.e., that, inter alia, said Court failed to articulate its reasons for determining that the death sentences imposed on applicant were not disproportionate, and how it compared the facts in his case with those in the cases referred to in its decision. He also contends that the cases it selected for comparison with applicant's were insufficient because none were non-capital cases.) This Court disagrees!

In the case sub judice the applicant apparently, to satisfy his lust abducted his eight-year old niece, tortured and mutilated her, and then stabbed her to death. Compare McCorquodale v. Balkcom, supra. That others, who may have committed equally heinous crimes, and received only life sentences is of no consequence, and simply represents the right of juries in Georgia to grant mercy. It is equally obvious that the perpetrators of equally heinous crimes have been sentenced to death.

Furthermore, it is now clear that such issue no longer raises a constitutional question. The Constitution does not require that a state's capital sentencing procedures provide for proportionality review, so long as its procedure eliminates the arbitrary imposition of the death penalty. The Georgia system comports with this requirement. Pulley v. Harris, ____U.S._____, _____S.Ct._____, _____L.Ed.2d_____(No. 82-1095, Jan. 23, 1984) pp. 12-13 of slip opinion. This ground is likewise without merit. See also Sullivan v. Wainwright, _____U.S._____, _____S.Ct._____,_____,L.Ed.2d_____(No. A-409, No. 29, 1983) 34 C.L. 4111, Maggio v. Williams, _____U.S._____, _____S.Ct._____, _____L.Ed.2d_____(No. A-301, Nov. 7, 1983) 52 L.W. 3363-4; Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983).

5. Exclusion of Prospective Juror Mitchell

While the applicant concedes that the State could properly exclude prospective juror Mitchell from service during the penalty phase (See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)), he nevertheless contends that the prospective juror was improperly excused from serving during the guilt-innocence phase.

Were this argument carried to its logical conclusion, the effect would require that two separate juries be selected and the case tried to conclusion twice, with the first jury passing on the applicant's guilt, and the second, after considering all of

the evidence presented in the guilt-innocence phase, as well as the punishment phase, determining the applicant's fate - if the first jury found him guilty of a capital offense. Witherspoon mandates no such requirement. McCorquodale v. Balkcom, 525 F. Supp. 408, 425 (N.D. Ga. 1981) affd____F.2d____(11th Cir. No. 82-8011, Dec. 30, 1983) (en banc); Williams v. Maggio, supra; Sullivan v. Wainwright, supra; Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981; Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978), cert. den. 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

E. FAILURE OF GEORGIA TO PROVILE FUNDS TO HABEAS CORPUS APPLICANT

It is well settled that a state has no obligation to provide funds to inmates who desire to attack their convictions collaterally. Willis v. Zant,____F.2d____(11th Cir. No. 82-8867?, Nov. 17, 1983) (pp. 706-7 of slip opinion).

F. EFFECTIVE ASSISTANCE OF COUNSEL

1. Introduction

Applicant's present counsel contends that the actions and inactions of his trial counsel both prior to the trial and during the trial, deprived him of his constitutional right to receive effective assistance of counsel. For the sake of clarity, these issues will be discussed seratum, keeping in mind the test to be applied - whether counsel's conduct was within the "range of

competence demanded of attorneys in criminal cases", and, if not, whether counsel's ineffectiveness caused "actual and substantial disadvantage to the course of his defense." Washington v. Strickland, 693 F.2d 1243, 1262 (5th Cir. 1982) (en banc), cert. granted ____U.S.____, 103 S.Ct 2451, 76 L.Ed2d___(1983) (argued Jan. 10, 1984) 34 Cr.L.4162.

2. Pretrial Actions (and Inactions)
(Alleged Failure to Investigate)

It is highly unlikely that an attorney who fails to investigate the circumstances of the crime and his client's background can adequately render effective assistance at trial. In the case sub judice, it is contended that Sawhill failed to adequately investigate the possibility of an insanity defense for the applicant and failed to adequately investigate any possible mitigating circumstances that could be utilized during the sentencing hearing. It is also contended that he failed to investigate, pursue and present evidence with respect to the challenge to the array.

(a) Challenge to the Array

With respect to this last allegation, it is clear from Sawhill's comments during the hearing on said Motion that he investigated the circumstances surrounding the selection and impaneling of the new grand jury which indicted the applicant and the jury wheel from which the jury panels were selected to try the applicant. It is likewise clear (at least circumstantially)

that three members of the jury were female and two [one male and one female] were black.

In a habeas corpus application, the burden is on the applicant to present evidence to support his allegations. In the instant case, applicant's present counsel has utterly failed to present any evidence to establish that Sawhill's investigation was insufficient or that the grand and traverse jury panels were not constitutionally selected. Under such circumstances, this issue is without merit. Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983).

(b) The Psychiatric Defense

To the extent he was able without expending his own funds, it is likewise clear that Sawhill attempted to ascertain whether there were any facts available which he could utilize to raise an insanity defense. To the extent he was able to do so, he primed the jury with that possibility during the voir dire examination and insured that the issue would be considered by them through his requested instructions four, six and nine (R-16 [pp. 65, 68]), which instructions were given by the Court in charge. R-11 (p. 492). See also pp. 491, 493, 524-525. To date, applicant's present counsel has failed to present any evidence which would show that the determinations as to the applicant's sanity made by the physicians at Central State Hospital were incorrect or that any other psychiatrist has evidence available to show that, in

such expert's opinion, the applicant was insane either at the time of the offense or at the time of trial, that the applicant did not understand the charges pending against him, and was unable to assist his attorneys in the presentation of his defense. On the other hand, as previously mentioned, on two different occasions, the applicant was psychiatrically evaluated and found to be sane both at the time of the offense and at trial. Under such circumstances, this issue, too, fails for want of proof. Finney v. Zant, 709 F.2d 643 (11th Cir. 1983); But see Westbrook v. Zant, 704 F.2d 1487, 1497 (11th Cir. 1983). See also Moore v. Zant, _____F.2d_____(11th Cir. No. 82-8683, Dec. 20, 1983).

(c) Mitigating Evidence

Present counsel also contends that Sawhill failed to uncover the existence of those witnesses whose affidavits were presented to the state habeas court, contending that such omission resulted in a failure to present the same in mitigation during the sentencing hearing. As previously mentioned Sawhill testified that he investigated the possible existence of mitigating evidence with every person whose name had been furnished him by the applicant's family. Based thereon, and because of the circumstances of the case [a family killing], he made a tactical decision to use only three witnesses - the applicant, his mother, and his Aunt Essie. In connection therewith, he met with them to discuss their possible testimony and specifically instructed Mrs. Messer not to

imply that she and the applicant were reconciled to his receiving the death penalty. [27] His plans were, unfortunately, thwarted when applicant's aunt was unable to return to court, the applicant refused to testify, and Mrs. Messer told the jury that she and the applicant were able to accept a death penalty as punishment for his actions. Finding his testimony "worthy of belief" this Court is compelled to conclude that this allegation is without merit.

A similar result is compelled regarding the allegation that Sawhill failed to investigate and pursue the special plea of insanity. Sawhill investigated the same and withdrew the Motion for legitimate tactical reasons.

3. Alleged Trial Errors

(a) The Voir Dire Examination

Present counsel contends that through his voir dire examination of prospective jurors, Sawhill implied that the applicant was obliged to "prove his innocence". A review of the colloquy referred to negates such allegation and affirmatively establishes that Sawhill's actions, in the presence of the entire jury panel, could lead to no conclusion other than that the appl'cant entered upon the trial of the case with the presumption of innocence in

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[27] He likewise testified, as previously stated, that he purposely did not specifically advise Mrs. Messer as to what her testimony should be because, in his opinion, it would have more impact with the jury if it was spontaneous.

his favor and that any prospective juror who was unable to accept that principle of law was not qualified to sit on the jury.

(b) The Failure To Object

Contrary to present counsel's allegations, this Court concludes that at the time the applicant was requested to accompany the officers to the police station to furnish a statement, the officers had probable cause to arrest him for the murder even though they were not obliged to do so. [28] It also concludes that the evidence of applicant's guilt was overwhelming. These matters were also obvious to Sawhill, who under such circumstances, centered his trial strategy on efforts to save the defendant's life - to avoid the jury's return of a death penalty. In his opinion, the only way in which such a strategy might work was for him to gain the jury's trust. He endeavored to gain that trust by adopting a "low key" profile, which meant that he would not object to otherwise admissible material nor would he attempt to dispute the undisputed facts. By admitting that the facts were as alleged and proven by the state and were not contested by the applicant, he hoped that his later prayer for leniency would carry more weight than had he vigorously attempted to challenge such efforts and was unsuccessful. Compare McNeal v. Wainwright, _____F.2d___ (11th Cir. No. 83-3331, Jan. 3, 1984). Consequently, his failure to object to the photographic identifications. Mrs.

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[28] Compare United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

Wood's testimony or the prosecutor's closing argument must be considered as a legitimate "trial tactic".

Insofar as present counsel contends that Sawhill failed to adequately litigate his Motion to Suppress the applicant's confession, this Court is compelled to conclude that such allegation is without merit, particularly in light of applicant's confession to his brother-in-law. (Tr. 258-261). From its review of the Jackson v. Denno hearing, it likewise agrees with the trial judge's determination. (Tr. 284-329). It likewise concludes that Sawhill's failure to object to the Court's instruction on malice and intent was not inappropriate: the challenged instructions are clearly distinguishable from that condemned in Sandstrom v. Montana, (442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and Lamb v. Jernigan, (683 F.2d 1332 (11th Cir. 1982)). See also Franklin v. Frances, _____F.2d_____(11th Cir. No. 83-8022, Nov. 16, 1983); Dobbs v. Zant, C80-247R (N.D. Ga., Jan. 13, 1984, Murphy, J.). It was not a burden-shifting instruction, nor did it eliminate the state's obligation to prove every material element beyond a reasonable doubt. Compare Hance v. Zant, 696 F.2d 940, (11th Cir. 1983); Corn v. Zant, 708 F.2d 549, 558-560 (11th Cir. 1983); Davis v. Zant, _____F.2d_____(11th Cir. No. 83-8244, Dec. 27, 1983).

Present counsel correctly observes that the trial court failed to instruct the jury regarding the outburst during the guilt/innocent phase of the trial (other than at the time the

outburst occurred), and that Sawhill failed to specifically object to such omission. While such "failure to object" to such omission can be characterized as "erroneous" it does not, standing alone, rise to the level of a constitutional deprivation of effective assistance of counsel in light of the totality of the circumstances and the court's previously given cautionary instruction.

(c) The Closing Argument

The Courts have often observed that in a capital case such as this, where the "operative facts" are not in serious dispute, the accused's trial counsel's most effective representation for his client occurs during sentencing - the presentation of mitigating evidence, and his closing argument. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1980). To some extent, this requires that we "second guess" trial counsel with respect to the evidence presented and the closing argument given. Stanley v. Zant, id at 966. See also Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983). In order to maintain the jury's "trust", Sawhill observed that he, too, was a father of small children, the crime was heinous, and the jury's burden awesome. McNeal v. Wainwright, supra. He, likewise, appropriately challenged the prosecutor's closing argument (to the extent that he contended that the jury would show as much fortitude in letting the applicant live as it

would in condemning him to death.) To that extent, his closing argument cannot be faulted.

This court is, however, compelled to conclude that Sawhill's argument did not go "far enough". Having reminded the jury that the question of whether the defendant would live was totally within its discretion, even though it might find the presence of statutory aggravating circumstances, he utterly failed to point out any matters which were favorable to the applicant - to "humanize" him, even though this was his alleged "tactic." Thus, the jury was reminded of no matters on which it could rely, justifying its extending a "hand of mercy". Compare Francis v. Spraggins, _____F.2d_____(11th Cir. No. 83-8338, Nov. 14, 1983); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983); Adams v. Wainwright, 709 F.2d 1443, 1445 (11th Cir. 1983); Dobbs v. Zant, supra. See also Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981) cert. den. 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981). Under such circumstances, such nonargument must be characterized as so woefully inadequate as to have resulted in a deprivation of applicant's right to effective assistance, particularly when coupled with his failure to move for a continuance to obtain the

testimony of other mitigating witnesses when the applicant refused to testify and his aunt failed to appear. [29]

CONCLUSION

For the above and foregoing reasons, IT IS HEREBY RECOMMENDED that the writ be granted as to the sentence only, and that the applicant be granted a new sentence hearing within 120 days of the affirmance of this Order or that his sentences be commuted to life imprisonment.

IT IS SO RECOMMENDED.

This 30th day of January, 1984.

Joel M. Feldman
JOEL M. FELDMAN
UNITED STATES MAGISTRATE

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[29] It is unclear as to why Sawhill abrogated this, his most important duty to the applicant. The only logical explanation is his lack of experience in such circumstances: Although he was an experienced criminal attorney, he had never previously tried a capital case in which the jury was called upon to consider the death penalty as a possible verdict.

THE COURT: Does the state have any evidence concerning the punishment phase?

MR. POSTLE: No sir Your Honor. We would just tender what has already been presented in the way of documentary evidence and testimony.

THE COURT: All right. Mr. Sawhill?

MR. SAWHILL: Yes sir, Your Honor, we would call Mrs. Mary Messer, the defendant's mother.

THE COURT: All right.

MR. SAWHILL: Mrs. Messer, please come around.

(Witness, Mrs. Mary Messer, comes to the stand)

DIRECT EXAMINATION

BY MR. SAWHILL

WITNESS - MRS. MARY MESSER, duly sworn.

Q Will you state your name please ma'am?

A Mary Alice Messer.

Q Is James Messer your son, please ma'am?

A James Messer, Jr.

Q How old is your son?

A Twenty seven.

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Q Tell us about him from the time he was born, please mam.

A Well, I guess the first time I seen him he had long black hair. It was straight, and had a red piece of ribbon tied in his hair. That was just a little while after he was born. And growing up he was just like any other child in a way, and in a way I guess his father was mean to him. I remember one incident when Jimmy was...can I call him Jimmy?

Q Yes mam.

A That's what I've always called him. He was around two years old, he was playing with a small car in the living room and he got up and walked over to me and his father, I guess had been off drinking a couple of beers, and he came in and he seen the car in the floor and said "get over here and pick this truck... car up" and like any kid he just kept on doing what he was doing right then and his father give out a big cuss word ...do I have to say what it was John, I don't cuss?

Q Say what is natural for you.

A He said "I mean it, right now" and Jimmy was a little slow getting up, like any two year old kid would be, and his father walked over there and started whipping him real hard and he told me , he said "if you get out of that chair I'll slap you down", and then he stomped out of the house and naturally I picked Jimmy up and tried to comfort him the best I could. And then that happened a few more times, and Jimmy was four in February, the 26th, and this was sometime around about the third week in

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March, I reckon, I was living with James then and we was over at the project and I was unemployed at the time...can I go back to that Christmas first John?

Q You can tell what you like.

A I was unemployed at the time, sometime in November, and I was drawing my unemployed check, which then ...of course you didn't get very much then, you were lucky if you got thirty five or forty dollars a week unemployment, and my husband was drinking and,I didn't know then at the time, running around with other women. And I went out to his,his grandfather's, grand daddy Messer, and I told him, I said, "I want to get Jimmy a Christmas tree and I don't have but a couple of dollars", and he said "I'll cut you a tree and it won't cost you nothing", so I got the tree and took it home and decorated it, Jimmy and I, I let him help me. And I bought him an electric train that year, a small one. I think it cost ten or twelve dollars. And his dad came in that night and I told him, it was Christmas Eve night then, I said "I want you to put Jimmy's train together". Well, in come one of my first cousins and he was drinking and had some beer and so they got down there and they were going to put it together but they got to drinking and after they got it together...well, they run it so much that night starting it and stopping it, making it scratch off until when Jimmy got up the next morning and turned the train on it only made one round on the track before it tore up and I guess I decided right then

J. HORACE JACKSON
COURT REPORTER
P. O. BOX 163
PHONE 404-221-8616

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and there I wasn't going to live with him much longer.

Q Did ya'll stay together?

A Sir?

Q Did you and your husband stay together?

A We was still living together then.

Q Did ya'll stay together?

A Then?

Q After that.

A Well, up until, like I say, about the third week of March.

Q This was when Jimmy was four?

A He was four that February.

Q Have you and your husband lived together since that time?

A Let me finish. Now, I said about the third week of February, it could have been the second, somewhere in there because it's been so long ago, it's been twenty three years ago. So I came in that night, Jimmy and I were in there, we had finished supper and James came in again and he was drinking and he slapped Jimmy for no reason at all and went up the stairs. It was a two story apartment, and I walked up there and I said "now James I'm not going to take much more of this", I said "you're going to change" and he turned around and he slapped me and I liked to fall down the stairs. He went on in there and went to bed and I got Jimmy and put him in another room with me, and I got up the next morning and I went over there and asked my father could I come home, Jimmy and I, and

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he said yes. But, wait a minute. Before he came in drinking I had been out with my cousin Jimmy and his wife ...let me think. I was over at their house playing Monopoly, I think it was, we had drove up to a service station and I seen my husband in the car with another woman then, and then that night he came in drinking, and I left him the next morning and I haven't ever lived with him since.

Q When did Jimmy get married?

A April, I think it was the 7th. He was twenty years old, because he laughed and made a joke with me. When I asked him he said 'Aw, I love Patty and I want to marry her'. I said, 'Well, do you think you're old enough to get married and be a husband' he made a joke out of it, he turned around and said 'Aw, I'm a year older than you was when you married'. And he said 'I will be a better husband to her than James was to you'.

Q Do you have any grandchildren?

A I have two John.

Q Where are they now?

A I don't know.

Q Where is Jimmy's wife?

A I don't know. I haven't seen them since...

Q ...have you been coming to see Jimmy?

A I'm trying to think how long it's been. Either February the 9th or 10th of last year. Yes, I've been coming to see

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Jimmy. I've been to see him every two weeks. You want me to tell you some more about him growing up? After I left James I went over at Dunson's where I work now walked in and told the overseer which I knew that I needed a job, that I had left my husband and I needed the money, and it was...I was still drawing unemployed, but in November he called me to work after that March and I have been steadily employed there ever since. I went to work November, November the 24th of that year, of '57...'58 one, and I supported Jimmy on my own, I never received any help or support outside of one time he brought Jimmy a pair of shorts and a pair of socks, and that's the only help I have ever received from him. And my father became, I guess you would say, a second daddy to Jimmy at that early age, he went to kindergarten two years and he was very well thought of, he got along very good with older people. I guess he was around there looking for a father image, you know. He could go to a neighbors house that lived close by where there was older men and he would sit and talk two, three,and four hours with them, and sometimes I've had to walk out on the porch and call him so it would be around eight o'clock and he would say "mama, I was just talking to Charlie Newberry, or Jody Hornsby, or Charles Fincher the man with me today. I have never remarried, I don't even date, I stayed at home to raise Jimmy the best I could. I worked six and seven nights a week in the mill on the third shift. I have got up a lot of days after working

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Friday nights, sleep two hours,and take Jimmy fishing, baiting his hook for him, learning him how to. I learned how to throw a rod and reel. I have got up with two and three hours sleep and drove to Atlanta stadium for Jimmy to see the Atlanta Braves play and came back the same night. I have, with two or three hours sleep on Saturday, when I didn't have to work Saturday night, get up and take him to Six Flags over Georgia, anything I thought that kids would enjoy without a father. Although some things did arise that I couldn't talk to Jimmy about, we...

Q ...Have ya'll talked about this incident?

A This incident?

Q Yes ma'am.

A Yes sir.

Q What have ya'll talked about about this incident?

A Well, Jimmy has told me, "I don't know why I done it mama". He says, "I just don't know". He said, "I can't understand why I done it". He has never been in trouble. Jimmy was an humble child growing up, he never was even stopped for speeding, in fact he worked on the school patrol the whole time he was in school, he was very friendly with the police officers, he could call them by their first names, and he was among the, I guess it was top honors for the patrol boys to to to the patrol boys camp, and he said one of the biggest thrills in his life was he was down there when Governor Lester Maddox came down and he got

to shake his hand, and that really excited him. And the first time his daddy came to see him he was seven or seven and a half years old and Jimmy didn't even know who he was until he told him. And then when Jimmy was around nine years old, he adored my father, and my father shot and killed himself over another woman and that liked to have broke Jimmy, in fact at the funeral home I missed him and I walked out to the car and he was crying and he said "mama, why did he do it, I've lost another daddy", he said "I just don't have any kind of a father that will love and help raise me". I didn't know what to tell him. I just sat there and cried with him.

And Jimmy, when he was in school, he went through the sixth grade all right and when he got to the seventh grade he got to where he couldn't learn and he failed the seventh grade, he had to repeat it. He went through the eighth grade and he failed the eighth grade then and he went back and he just said "mama, I can't learn, I just can't learn, I can't learn, I can't", said "just let me get a job and go to work and help you", he said "you've raised me all your life without any help" and said "I want to help you". He said "I'm failing again, I just can't pass". And I told him if he thought that was best, he said "maybe I can go to night school later when I get a little older and learn a little more". I told him he could go to work so he got a job in the mill working, he was working on a winder before we had to change over, he worked a few months and he was

laid off because they took out the automatic winders, which I was running but I had enough seniority to be transferred to the spools. They laid him off and he broke down and cried that night and said God mama, I can't even help you, I can't even help you and pay you back what you've done . Well, then he got another job he got a job then out at the hospital and he liked that job, he was working...I think it was central supply, he would take medicine and all up to the different floors, and while he was up there one day there was...I'm not going to call her name John, another woman there that his daddy was supposed to have married. I don't know whether he did or not, but he walked in the room and she said, and she had heard his name or seen his name on his coat, and she asked him and he said "my name is James Messer, Jr., they call me Jimmy", and she said do you know James Messer, and she described him and Jimmy said, I looked at her and I said yes he married my mama and he's my daddy but God I don't even know him as a man .

He and Jimmy went out to my uncle's ...he was working, he worked at that place, he found out he could make more money at fellow Hirt and he found a car he wanted, I'm not for sure what year, '67 or '66 Pontiac Lemans, it was a beautiful car. Lavender ..dark blue with a light blue stripe and when he went to work up there he said I want that car mama' and I said O.K. if you think you can pay for it", he said, 'well, I knowed I could talk to you and get you to go on a note with me", and

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I said yes, if you work and pay for it I'll sign it and let you get a car. So he did, he got his car, and he worked up there a good while, he stayed with my uncle and he'd come home on weekends, but he'd go to church when he come home. He was a big worker in the youth group, they would get together, young people, and go out, and go into homes of people who were not able to come to church, they'd have prayer meeting. But one thing Jimmy told me he enjoyed was going to talk to prisoners in our home town, he said "mama, I feel like we're doing more good there than we are anywhere else, those people need help", and said I believe God has called me so let me go and talk to them, and I said "well, Jimmy, if you want to and you think that's what God wants you to do, do it".

So while he was up at my uncle's he come home one night laughing, he looked happy, and I said "Jimmy, what's the matter with you, you look great", he said "mama, I met the most wonderful girl you ever saw today", said "her brother brought her up there and introduced her to me", he said, "her name was Peggy". He said, "I think she kinda liked me". I said, "well, it's up to you". So, he said "she don't live there, she lives up out of Bremen", he said, "I may be late next Saturday night but I'm going up there to see her", so he did but he was in around one or two, and he was just really enthused over meeting Peggy. he said "I've never met a girl like her", and he said, "mama, I know you're going to like her", said, "you've always

J. HORACE JACKSON
COURT REPORTER
P. O. BOX 156
BREMEN, GEORGIA 30110
PHONE (404) 537-2510

77.231.825

said you wished you had a daughter", said "maybe I've found you one". I said, "well, if she's what you want Jimmy", and he talked to me a lot about Peggy and he asked me one day, he said mother, will you go up and meet her", he said, I don't know whether her daddy is going to let her come down here or not with me", and I went up and met her, and in fact Jimmy and I and Peggy and her twin sister Pamely went to Six Flags over Georgia and I paid Pamela's way to get her to go so Mr. Houston would let her go and I got to know them good, I liked Peggy, and we even went to her shower, I got off from work to go to her shower up at her mother's house, and I went to the wedding, I was proud to, in fact I took a lot of my kinfolks with me.

And then Jimmy moved up at Canton, he and Peggy, and he came down and invited us to come up one day and I said "Jimmy, I don't know where Canton is", he said "well, follow me up there", so I did, and we stayed over night at a motel and came back. I liked the little house, it was just a little three room house but it was cute and in a cute place. And then Jimmy called and said "mama, can you come up here, you and Granny and Dorothy and help me move", said, "we're going to move to LaGrange, and find us a house". I found two or three that was empty and for rent and I took them over there, they picked out one on Lewis Street, and he said "can you help us move" and I said "we'll try to", well my sister and I got off from work again to go up and help Peggy and them move, in fact

J. HORACE JACKSON
COURT REPORTER

77.201.833

we even paid for the moving van that moved them, and we went over there and helped Peggy scrub out the house, hang the draperies, and everything.

Q Mrs. Messer.

A Yes.

Q All that is behind you now.

A Yes, I know.

Q Has Jimmy told you anything about what he expect is going to happen?

A Yes. Jimmy and I have talked consistently about it and he and I both, my sister, and my mother expect the death penalty here and we have consistently talked about it, and since this has happened John,Jimmy has got saved, he's confessed his sins to Christ, and he told me, he said "mama, the Lord has forgiven me", he said "I just hope Wayne and Joyce can".

MR. SAWHILL: I have no further questions.

MR. PUSTILK: I have no questions of Mrs. Messer.

(Witness, Mrs. Mary Messer, leaves the stand)

THE COURT: You have the opening and concluding Mr. Sawhill.

MR. SAWHILL: Your Honor, I waive the opening and reserve the right to close.

THE COURT: All right.

anger-causing or in any way upsetting so as to demonstrate inner family feeling; therefore, it was my hope and wish that with a low-key approach and leaving it up to 12 jurors that would under the law hopefully be unrelated to and unconnected with the family, that then the human side of Mr. Nesser was depicted to them with the understanding that the State was not going to be introducing anything and did not in the sentencing phase, there was the hope that they would choose to let him live.

Q. That was your hope?

A. Yes, sir.

Q. In fact, that was your strategy in this case, wasn't it? Your tactic was to hope that by presenting the human side of Mr. Nesser --

A. When all else failed, yes, sir.

Q. -- that that would be his best chance of riding out the death penalty?

A. Yes, sir.

Q. Avoiding the death penalty?

A. Yes, sir.

Q. Present the human side of James Nesser, and to do it in a low-key fashion. Okay.

So when we talk about this psychiatric and your discussions with Leary and hoping to bring out certain things from investigator Leary regarding alleged incidents and

Q. Did you sit down with her and say, "This is what I am going to ask you, this is what I want you to testify about?"

A. I didn't tell her what I wanted her to say. I wanted it to be spontaneously humane in the fashion of a mother, unprepared, in the sense that she was giving verbatim wrote-out-of-my-mouth kind of testimony, I wanted her to be as emotional as she possibly could and I wanted her to convey her sense of his never having had anything in his past that would have indicated that in any way this would have occurred.

Q. And it was your opinion that she was the best person to put this on?

A. Yes, sir.

Q. She was the best person to say that he had no record?

A. No, sir, he was the best person to say that.

Q. Did you prepare him to take the stand?

A. Only as to those limited questions and his employment.

Q. Why didn't you ever subpoena anybody from West Point Pepperell to come in and put his record in?

A. Because I had an agreement from the District Attorney's office that the record would be admissible.

Q. Why wasn't it admissible, then?

A. It would be admissible upon him taking the stand.

SAWHILL'S CLOSING ARGUMENT FOR GUILT-INNOCENCE PHASE

"Your Honor, ladies and gentlemen of the jury, I asked ya'll a lot of questions to begin with about what you were bringing in this court room in the way of knowledge, whether that would affect you in coming in and each and every one of you said it wouldn't and to that end I respectfully recognized each and every one of your responses.

As to what the evidence has been I don't contend that the evidence is, I haven't said anything about it. I would be no less honest with each and every one of you if I tried to tell you the evidence said something other than what Mr. Sammons indicates occurred on that day so I'm not going to. Each and every one of you persons indicated to me that you'd be honest with me in coming into this court room and casting aside anything that you had heard previous to coming in here, it would have no effect on your verdict, no effect on how you looked at the defendant, no effect on how you looked at the evidence. I'm a parent too and I can't explain or give you some easy explanation for why so I won't try.

The judge will charge you the law in this case and with that law that the judge charges you each and every one of you when you go into that jury room you take with you the evidence that's been received and render a verdict. A verdict that speaks the truth. I don't think in a situation like this there's anything that I can say except to say thank God this is over. I don't now what ya'll are going to believe brought this situation to happen. I have been with this matter nine months and I certainly can't suggest to you why or I'd get on the stand and tell you, I can't do that. At the moment I suggest to each and every one of you what you should do, this is your community and your court and laying aside everything except your common sense and experience, which I dare say there's probably five hundred years worth of it in this jury box right now, I dare say you've got five hundred years of common sense and experience and there is not one bit...not one bit that's seen anything like this before and I pray to God that none of you or myself, or the other people in this court room, will ever see anything like this again. I'm not going to be dishonest to ya'll and say something to change what the evidence is, the law the judge gives you as to how to consider this evidence. That's all I have. Thank you".

(R-11, P. 482-484).

SAWHILL'S CLOSING ARGUMENT AT SENTENCING

Your Honor, ladies and gentlemen, since ya'll were selected I might add I haven't taken the opportunity to talk to ya'll a lot but I have been honest and in that honesty I haven't tried in any form or fashion to do anything other than see that the facts in this case were presented and they were very ably presented, there's no question about that.

Now, I knew that when I got involved in this case at the beginning they would be. The question in this case is not the facts. Twenty nine times I said "no questions". Thirty times I said "no objections" to a witness being excused. Each and every one of us knows the young girl died. Like Mr. Foster, I have two young children of my own and believe you me that makes it more difficult for me to stand here in front of you all right now, each and every one of you, than it does for Mr. Foster, I dare say. I don't ask you to appreciate that. I don't ask for that at all. I just want to be straight up and honest about this whole thing and where we are all coming from. Each and every one of you in this jury box know before this case started or had some slight idea, that we were going to be at this point today where we are now and the decision was going to come down to the twelve of you and what you determine to be Mr. Messer's fate.

I dare say, and it has been suggested to me, and I say this in all humble candor, by some both here and in Rome that I ought to argue to this jury to leave him alive is a more cruel punishment because he's got to live with it, so I don't know what to say to you. I really don't. I know that at this particular point there is no question in my mind that verdict this jury spoke in this court room today was the truth. I don't contest that at all. The question is when the judge tells you what the law is in this situation and what is considered to make something aggravating circumstances, what is considered to mitigate circumstances, he's also going to tell you that in a situation like this you can almost disregard those and leave it up to yourselves, your gut feeling as to what it is you feel speaks the voice of the community.

Now, the community, a great part of the community, has been here in this court room as potential jurors and as members of the audience, and it concerns Polk County. Interestingly enough Judge Winn told me two weeks ago that he didn't think there would be anyone here by the end of the trial that it had been a long time since there had been a trial like this and the last time a good many years ago he could remember that there just wasn't ten or fifteen people by the time the trial got done with, people were just that uninterested. But that's not true in

this situation because people have been very interested, and very interested right now with what is this community's voice through ya'll going to be.

Unfortunately, I do not agree again with Mr. Foster as to his position that each and every one of you by rendering a verdict that speaks for the death penalty are being brave. In not doing that you're showing people outside of Polk County that you don't know how to deal with people who take the lives of others in Polk County. That's not the issue. Nor is it the bravest thing to do in this situation to vote the death penalty. It would take a heck of a lot more guts to say that there's something in that human being who sits over there, sits over there having to remember what ya'll have just learned about him. There's something that put extent that you choose to use that the law allows each and every one of you to do it. That's an awesome responsibility and I dare say I would rather be over here than in ya'll's seats, because as a parent under these circumstances ... but that's for ya'll to decide. Please however, as the judge will charge you, the decision is each and every one of yours individually and then as a group, your decision be it give him life or death is your decision, you need not worry about what happens after that decision as to how it's carried out. That makes it a lot easier as far as the decision is concerned in having to live with it but it's still your decision, and if your decision is life that is a decision that you have come about to make freely and honestly based upon all that you've heard in the case and there might be some reason to leave this man on the face of the earth then hold onto that decision, if not then let it go, but make it your own decision, each and every one of you, don't make it a decision of your friends and neighbors that you just adopt. I dare say ten years ago had any of you ever pictured yourselves being in this situation and having to make this decision ten years from then you wouldn't. Thank you.

EDITOR'S NOTE

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NO. 85-5571

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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JAMES E. MESSER, JR.,

Petitioner,

v.

RALPH M. KEMP, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

Please Serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTION PRESENTED

I.

Did the Eleventh Circuit Court of Appeals properly apply the standards of this Court set forth in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984), in evaluating Petitioner's claim of ineffective assistance of counsel at the sentencing phase?

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PART ONE

STATEMENT OF THE CASE

Petitioner, James E. Messer, Jr., was indicted by the grand jury of Polk County, Georgia, during the November Term, 1979 for kidnapping with bodily injury and for the murder of Rhonda Tanner. A special plea of insanity (incompetency to stand trial) was filed on behalf of the Petitioner. After subsequent psychiatric examinations concluded that Petitioner was mentally competent and criminally responsible, the special plea of insanity was withdrawn. Following a trial by jury, Petitioner was found guilty on both charges and was sentenced to the death penalty on both offenses. A motion for a new trial was denied and a notice of appeal was filed.

On direct appeal the Supreme Court of Georgia considered six issues presented by the Petitioner and also considered the validity of the death sentences imposed. The court affirmed

both convictions and sentences. Messer v. State, 247 Ga. 316, 276 S.E.2d 15 (1981). Petitioner's motion for rehearing was denied by the Supreme Court of Georgia on March 18, 1981.

Petitioner subsequently filed a petition for a writ of certiorari in this Court challenging the denial of an independent psychiatric examination, the denial of the motion for a change of venue and the denial of the motion for a mistrial. Said petition was denied by this Court on October 5, 1981. Messer v. Georgia, ___ U.S. ___, 102 S.Ct. 367 (1981).

Petitioner next filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, on January 5, 1982. That court denied relief without a hearing on February 23, 1982. The application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on April 20, 1982. This Court denied a petition for a writ of certiorari on October 4, 1982.

The instant federal petition for a writ of habeas corpus was filed in the United States District Court for the Northern District of Georgia on November 23, 1982. An evidentiary hearing was held before United States Magistrate Joel M. Feldman on August 5, 1983. On February 1, 1984, the magistrate entered a report and recommendation recommending that relief be denied as to the conviction, but suggesting that relief be granted as to the sentencing phase, finding that counsel was ineffective during the closing argument at the sentencing phase. Both parties filed objections to the report and recommendation. On March 30, 1984, the district court entered an order adopting all portions of the magistrate's report and recommendation except for that portion dealing with the effectiveness of counsel at the sentencing phase. The district court concluded, without reaching the question of the effectiveness of counsel, that Petitioner had failed to show any prejudice resulting from this allegation. The district court ruled on certain issues that had not been addressed by the initial report and recommendation as well. The application

for a certificate of probable cause was denied by the district court, but granted by the Eleventh Circuit Court of Appeals on June 1, 1984.

Subsequently, a panel of the Eleventh Circuit Court of Appeals affirmed the decision of the district court denying habeas corpus relief. Messer v. Kemp, 760 F.2d 1080 (11th Cir. 1985). A petition for rehearing was filed on behalf of the Petitioner which was denied on August 23, 1985. Petitioner has now filed the instant petition challenging the decision of the Eleventh Circuit Court of Appeals.

PART TWO

STATEMENT OF FACTS

On the morning of February 13, 1979, eight-year-old Rhonda Tanner went to College Street Elementary School in Cedartown, Georgia. Normally, Rhonda rode the bus to and from school; however, that afternoon at approximately 2:30 p.m., James Messer, Rhonda's uncle, picked her up at school. (T. 204, 202). Petitioner was driving a 1976 Pontiac with the license tag RUP-779. (T. 367). Petitioner told the school principal, Sam Brabson, that Rhonda's father was injured at his construction job and that the victim's mother sent the Petitioner to pick up the little girl. Rhonda left the school with the Petitioner and was not seen again.

When Rhonda did not get off the school bus that afternoon, her mother became worried and drove to the school looking for her. (T. 156, 207, 218). Mr. Brabson told Mrs. Tanner what had transpired earlier and described the Petitioner. Mrs. Tanner contacted her mother-in-law who in turn called the police and also called Petitioner's wife. Petitioner's wife stated that she did not know of any reason why the Petitioner would pick up Rhonda. (T. 158).

Petitioner's sister-in-law, Pamela Dunn, was at the Messer home early that evening. Ms. Dunn testified that Petitioner came in the door cursing, stating that he had been at the doctor's office all day. Petitioner went straight to the bathroom and changed his clothes. (T. 242). In reference to Rhonda's disappearance, Ms. Dunn asked the Petitioner what could be wrong with Rhonda. Petitioner responded, "I don't know and I don't give a damn." (T. 243).

The next day Ms. Dunn was driving down Old Mill Road and spotted Rhonda's coat lying in some bushes near the railroad tracks. Ms. Dunn notified the police. (T. 246). Law enforcement officials later found Rhonda's blood-covered body in a wooded area near the railroad tracks off Old Mill Road.

There was evidence of a lot of movement in the brush surrounding the body. Authorities also found Rhonda's books, slacks and panties nearby.

Dr. Byron Dawson of the State Crime Lab testified as to the condition of the victim's body. The victim's face, neck, upper chest and buttocks were covered with contusions, lacerations and abrasions. The abrasions and contusions surrounding the eyes were consistent with hard blows by a fist. (T. 462). Wounds on the right side of the face and forehead were consistent with the sole of a shoe. (T. 468-469). There was also bruising on the shoulders, collar bone, front throat and left arm. Scratches were found on the victim's right arm and lower legs. (T. 464-465). There were six stab wounds to the body; some of the wounds had abrasions around the wounds where the knife handle had actually hit the victim's body. There were also five knife slashes across the victim's abdomen. The cause of death was determined to be internal loss of blood secondary to the stab wounds. Swabs taken from the victim's abdomen and vaginal area indicated the presence of sperm. (T. 440).

The police conducted an investigation and interviewed several witnesses from the school and other individuals. This investigation led the police to the Petitioner. The investigation also revealed that on February 13, 1979, Robin Slides was driving down Old Mill Road at approximately 3:35 p.m. and noticed a Pontiac parked on the side of the road near the railroad tracks. A few minutes later Slides saw a man walk from the railroad tracks to the car. (T. 231, 232). The following day, Slides reported the incident to police and identified Petitioner's car. (T. 234, 235).

Retha Wood, an employee at Barber's Service Company, testified that on the morning of February 13, 1979, Petitioner came into the store inquiring about light fixtures and supplies. (T. 164, 165). Mrs. Wood was alone in the store at that time. Petitioner insisted that Mrs. Woods go to the back

storeroom to get the supplies he needed, but she refused. Mrs. Wood called her husband to the store because she was afraid. Petitioner left the store, but returned later thinking Mrs. Wood was alone. Mr. Wood appeared from the back of the store and the Petitioner again left the store. At approximately 2:30 p.m., Mrs. Wood saw Petitioner drive by the store and look in the window. Mrs. Wood wrote down the Petitioner's license tag number which was RUP-779. (T. 169). According to Mrs. Wood, the Petitioner was headed in the direction of College Street Elementary School which was located a few blocks away from her store. That night Mrs. Wood reported the Petitioner and a description of his car to the police. Mr. and Mrs. Wood later identified a photograph of the Petitioner. (T. 172, 175, 185, 187).

Witnesses who saw the Petitioner on February 13, 1979, identified the Petitioner as wearing a red cap, blue jeans and a tan jacket. On the evening of February 14, 1979, Brabson and two other witnesses from College Street Elementary School identified a photograph of Petitioner as the man who took Rhonda from school on the preceding day.

At approximately 6:00 p.m. on February 14, 1979, G.B.I. Agent Jerry Longino, F.B.I. Agent Leary and Cedartown Police Officer Dean went to a trailer on Rockmart Highway to talk with Petitioner. Petitioner agreed to follow the officers to the Cedartown Police Station where he voluntarily gave a statement and signed a waiver to search his house. Petitioner was not under arrest at the time. The statements made by the Petitioner were later admitted at trial after a Jackson v. Denno hearing. After the confession the Petitioner was arrested.

Initially the Petitioner denied killing Rhonda, but when confronted with the fact that witnesses had identified him, Petitioner broke down crying and admitted the murder. (T. 359, 360, 366-8). Petitioner stated that on February 13, 1979, he tried to pick up a female employee at Barber's Service Company

without success, so he drove to College Street Elementary School to get Rhonda. Petitioner stated that when he picked up Rhonda at school, he had planned to molest her, but not to kill her. Petitioner told Brabson that he came to pick up Rhonda because her father had been hurt on his job. (T. 341, 369, 401). Petitioner and Rhonda drove down by Old Mill Road to a deserted wooded area near the railroad tracks. Petitioner told Rhonda that he wanted to play a game and the two walked into the woods. Petitioner began to molest Rhonda. When she resisted, the Petitioner beat and stomped her head with his fist and shoe. Petitioner admitted that he stabbed Rhonda with a knife six times and slashed her abdomen. Petitioner also admitted pulling down his pants and masturbating, but denied having sex with the victim. Petitioner stayed in the woods with the victim approximately thirty minutes. (T. 386, 403).

Petitioner returned to his car and threw away Rhonda's books and coat. Petitioner stated that he washed off his knife and threw his cap in a creek behind Old Mill Restaurant. Petitioner showed the officers the knife he used in the killing and also showed the officers a bruise on his right foot where he had kicked the victim.

Police recovered a red cap from the creek behind Old Mill Restaurant. The State Crime Lab conducted tests on various portions of evidence and found that hair having a common origin with the Petitioner was in the red cap and also on a sheet used in transporting the victim's body. A plaster cast made of a footprint found near the victim's body was consistent with Petitioner's shoe. (T. 429). Tests made on Petitioner's shoe and knife suggested the presence of blood. Blood found on Petitioner's blue jeans was found to be the same type as that of the victim. (T. 434).

Further facts will be developed as necessary for a more thorough explanation of the issues presented by the instant appeal.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY APPLIED THE STANDARD OF THIS COURT IN STRICKLAND V. WASHINGTON, ___ U.S. ____, 104 S.CT. 2052 (1984), IN RESOLVING PETITIONER'S ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE.

In the instant petition, Petitioner challenges the Eleventh Circuit's resolution of his allegation of ineffective assistance of counsel at the sentencing phase. Although Petitioner had previously challenged the effectiveness of his counsel at trial, Petitioner apparently is not presenting that issue as an allegation before this Court, but is focusing on the sentencing phase allegation. Respondent submits that the Eleventh Circuit Court of Appeals properly applied the standards of this Court in Strickland v. Washington, supra, and that no reason exists for this Court to grant a petition for a writ of certiorari.

The allegation concerning the effectiveness of trial counsel was first presented to the state habeas corpus court. That court specifically found that Petitioner did receive effective assistance of counsel at trial. When the issue was raised in the district court, as no hearing was held in the state courts, a hearing was ordered before the magistrate. The magistrate heard evidence from Petitioner, his trial counsel as well as other witnesses. The magistrate found, "counsel investigated and interviewed those prospective witnesses in mitigation whose names had been furnished him, and made a tactical decision to limit such witnesses to the applicant, applicant's mother and applicant's Aunt Essie Messer, rejecting others for tactical reasons. . . . At the presentence hearing,

he was only able to call the applicant's mother because the applicant refused to testify, and Essie, although present earlier, failed to return to court." (R. 428). The magistate also found that counsel met with the Petitioner's mother several times to prepare for her testimony. Counsel made a decision not to tell Petitioner's mother specifically what to say and told her not to tell the jury that she and the Petitioner were reconciled to his receiving the death penalty. (R. 428). The magistrate credited the testimony of trial counsel regarding his preparation for the sentencing phase and concluded that the portion of the allegation relating to counsel's failure to present evidence at the sentencing phase was without merit. The magistate did find counsel ineffective based on the closing argument at the sentencing phase. When the district court considered this allegation, the district court concluded, in relation to the closing argument at the sentencing phase, that Petitioner had failed to show the requisite prejudice. The court considered the question in light of the evidence and the totality of the performance of trial counsel and found that there was no actual and substantial prejudice. (R. 477). The court did not decide whether the argument itself was ineffective.

On reviewing the allegation, the Eleventh Circuit Court of Appeals considered the allegation of the effectiveness of counsel at the sentencing phase. In regard to the assertion that counsel failed to present available witnesses, the court noted "that an attorney's actions, including his decision to put a particular character witness on the stand, is given great deference by this Court." Messer v. Kemp, 760 F.2d 1080, 1091 (11th Cir. 1985). The court found the following with regard to trial counsel's investigation of mitigating evidence:

> We have reviewed Sawhill's testimony from the state (sic) habeas proceeding. He thoroughly investigated Messer's background

> and was familiar with the mitigating evidence which was available. He was very much aware of the possible character witnesses and had spoken to most of them. Sawhill further indicated that he had every intention of calling some of these witnesses, but that for the most part, they appeared reluctant to testify on Messer's behalf. Faced with such a dilemma, we are not prepared to say that Sawhill's decision not to put these witnesses on the stand was unwarranted. See id. Even more importantly, we have reviewed the mitigating factors which were to have been introduced by these witnesses, and we find that they do not even begin to tip the balance of aggravating and mitigating circumstances in favor of Messer.

Messer v. Kemp, supra, 760 F.2d at 1091.

The court further found that there was no merit to the allegation that Sawhill failed to prepare the Petitioner's mother to testify. The court noted that Mr. Sawhill testified he discussed the testimony with Mrs. Messer on several occasions and specifically testified that he instructed her not to mention that her son was anticipating the death penalty. The court concluded that the Petitioner had failed to show that Sawhill's performance during the sentencing phase was deficient under the standard of Strickland v. Washington, supra. The court concluded, "even if we accept that some of Sawhill's specific actions fell outside the wide range of reasonable professional assistance, we nonetheless are convinced that under the totality of the circumstances, they in no way affected the ultimate outcome of the guilt or sentencing phase of this trial." Id. at 1092.

In Strickland v. Washington, supra, this Court set forth the standards to be applied in evaluating claims of ineffective assistance of counsel. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id., 104 S.Ct. at 2064. This Court found that the same principle applied to a capital sentencing proceeding. Furthermore, a defendant must show that counsel's performance was deficient, that is, show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Furthermore, a defendant must also show that the deficient performance prejudiced the defense by showing "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. In order to prevail on the first prong of the test, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." Id. at 2065. Judicial scrutiny is also highly deferential in examining counsel's performance. The court should avoid the inclination to second-guess counsel after the fact.

In examining an allegation of prejudice, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 2067. This Court resolved the question of prejudice by concluding that a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 2068. In the context of a sentencing proceeding the question is "whether there is a reasonable probability that, absent the errors, the sentencer -- including the appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of

aggravating nd mitigating circumstances did not warrant death." Id. at 2069. "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id. at 2069.

It is clear from a review of the opinion of the Eleventh Circuit Court of Appeals that that court applied the standard set forth by this Court in Strickland v. Washington, supra. It is further clear that that court made proper application of this constitutional standard in evaluating the allegation of ineffective assistance at the sentencing phase. As noted by that Court, counsel made certain strategic decisions as to how to proceed at the sentencing phase and such decisions were reasonable under the circumstance. Furthermore, Petitioner has simply failed to show that counsel's conduct was unreasonable under the facts and circumstances of this case. Finally, Petitioner has failed to show any prejudice sufficient to warrant reversal under the standards of Strickland v. Washington, supra, as Petitioner has not shown a reasonable probability that the outcome of the proceeding would have been different had counsel acted differently at the sentencing phase.

As the Eleventh Circuit Court of Appeals properly app'ied the standards set forth by this Court, there exists no constitutional question for review by this Court.

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that this Court deny the petition for a writ of certiorari filed on behalf of James E. Messer, Jr.

Respectfully submitted.

MARY BETH WESTMORELAND 750150
Assistant Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS 071650
Attorney General

MARION O. GORDON 302300
First Assistant Attorney General

WILLIAM B. HILL, JR. 354725
Senior Assistant Attorney General

MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the bar of the Supreme Court of the United States and counsel of record for the respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for Respondent upon the Petitioner by depositing copies of same in the United States mail with proper address and adequate postage to:

Howard J. Manchel
101 Marietta Tower
Suite 3311
Atlanta, Georgia 30303

This 4th day of November, 1985.

MARY BETH WESTMORELAND
Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

JAMES E. MESSER, JR. *v.* RALPH KEMP, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5571. Decided January 21, 1986

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The petitioner in this case, James Messer, was sentenced to death by a jury that was unable in any meaningful fashion to give him the "individualized consideration" to which he has a constitutional right, *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion), because of egregiously unprofessional assistance by his trial counsel. I believe that petitioner has clearly met the standard that this Court set in *Strickland* v. *Washington*, —— U. S. —— (1984), for establishing ineffective assistance during the sentencing phase of his trial, and I would accordingly grant the petition and vacate petitioner's sentence.

I

Petitioner was convicted of kidnapping and murdering his eight-year old niece. After his conviction and sentence were affirmed on direct review, he sought a writ of habeas corpus in state court, alleging, *inter alia*, ineffective assistance of counsel. The court declined to hold a hearing, made no findings, and denied the writ. Petitioner then sought federal habeas relief. The Magistrate to whom the case was referred recommended that the writ be granted as to the sentence, concluding that petitioner had received ineffective assistance during the penalty phase. The District Court nevertheless denied the writ. It concluded that petitioner had not established prejudice, as required by *Strickland*, *supra*, and therefore did not reach the question whether

counsel gave adequate assistance. The Court of Appeals affirmed, 760 F. 2d 1080 (CA11 1985), with one judge dissenting, *id.*, at 1093 (Johnson, J., dissenting).

II

The only factfinder that has considered the question, the federal Magistrate, found that petitioner has met the first *Strickland* criterion—that counsel's performance at the sentencing phase was "outside the wide range of professionally competent assistance," *Strickland*, —— U. S., at ——. Even the most cursory review of petitioner's trial demonstrates that the Magistrate's conclusion was inescapable.

At petitioner's hearing before the Magistrate, counsel testified that he had decided as a matter of strategy to adopt a "low-key" approach during the guilt phase, in hopes of establishing credibility with the jury. He had then hoped to "humanize" petitioner during the sentencing phase and try to convince the jury to spare petitioner's life. 760 F. 2d, at 1088. Both the majority and the dissenter in the Court of Appeals concluded that this strategy was not unreasonable in light of the overwhelming evidence of petitioner's guilt. *Id.*, at 1090, 1095.

Counsel succeeded admirably in implementing the first part of his strategy. He made no opening statement and put on no case-in-chief. He performed only cursory cross-examination, and did not object to any evidence. *Id*, at 1089. Counsel's attempts to carry out the second prong of his strategy, however, were piteously deficient. His brief summation during the guilt phase, after acknowledging his "frustration" with the case, App. B to Pet. for Cert., p. 14 (opinion of district court), went on to "emphasize the horror of the crime," 760 F. 2d, at 1095 (Johnson, J., dissenting), to the very jury that would soon be called upon to determine whether the murder was "outrageously or wantonly vile, horrible, or inhuman," Ga. Code Ann. § 17–10–30(b)(7).

During the penalty phase, counsel put on a single witness, petitioner's mother. She testified concerning petitioner's childhood, which was marred by mistreatment at the hands of his father and his parents' subsequent divorce. The effect of this implied plea for pity, however, was then destroyed when counsel, despite having previously warned the witness to avoid the topic, asked her what petitioner had told her about his expectations. She replied "he and I both, my sister, and my mother expect the death penalty here." *Id.*, at 1096.

It was counsel's summation during the penalty phase, however, that led the Magistrate to conclude that petitioner's Sixth Amendment right to counsel had been violated. His statement, which the Magistrate called a "nonargument," *id.*, at 1097, made no mention of petitioner's mother's testimony nor of any other mitigating evidence.* Counsel did not inform the jury, during summation or at any other time, that petitioner had no prior criminal history, had been steadily employed, had an honorable military record, had been a regular churchgoer, and had cooperated with the police. See *id.*, at 1096, n. 2. Counsel did not give the jury a single reason why it should spare petitioner's life. As the Magistrate noted, counsel "utterly failed to point out any matters which were favorable to [petitioner]—to 'humanize' him, even though this was his alleged 'tactic.'" App. C to Pet. for Cert., p. 51 (Magistrate's Report and Recommendation). Insead, counsel repeatedly hinted that death was the most appropriate sentence for petitioner. He "focused on the awesome burden placed on the jury in determining Messer's fate and the fortitude that would be required of a juror to decide to let him live, as if the easiest and most obvious verdict were the death sentence." 760 F. 2d, at 1097.

The net result was that petitioner was without an advocate at the sentencing phase. "No one addressed the jury and

*Counsel's summation at the penalty phase, in its entirety, is set out in an Appendix to this opinion.

said that Messer did not deserve to die." *Ibid.* Like the Magistrate and the dissenter in the Court of Appeals, I cannot help but conclude that a total breakdown in the adversarial process occurred in this case.

III

The District Court rejected the Magistrate's conclusion because it felt that petitioner had not established the second *Strickland* criterion—that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, —— U. S., at ——. The Court of Appeals held that counsel's performance was not constitutionally deficient. Yet it never even mentioned counsel's summation nor the Magistrate's finding that the summation was unreasonable and ineffective. I can only presume that the Court of Appeals failed to find prejudice as to the summation, based on its conclusory statement that "petitioner has failed to show that [counsel's] performance during the sentencing phase was deficient to the extent that this court cannot rely on the result as being just." 760 F. 2d, at 1092 (citation omitted).

The result below is thus an example of the gross unfairness that results when the *Strickland* prejudice standard is applied without regard to the special characteristics of a capital sentencing proceeding. See *Strickland*, *supra*, at —— (MARSHALL, J., dissenting). Those proceedings have a much different function than the relatively mechanical inquiry of the guilt phase, and the likelihood that an appellate court can accurately divine a jury's probable response to evidence or arguments is accordingly less. Just last Term this Court reiterated that a capital defendant has a constitutional right to the consideration of "[w]hatever intangibles a jury might consider in its sentencing determination." *Caldwell* v. *Mississippi*, —— U. S. —— (1985), see also *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (defendant has constitutional right to consideration of mitigating factors). Yet as applied by the

courts below, *Strickland* permits unprofessional conduct by trial counsel to deprive a capital defendant of that right.

Viewed in the correct light—that is, considering what the jury in this case might have done if presented with a true adversarial debate on the appropriateness of sentencing petitioner to death—one cannot possibly conclude that there is no "reasonable probability" that the outcome would have been different. This is not a case in which, despite unreasonable errors by counsel, the jury was presented with a substantially accurate picture of the defendant and with some cogent argument in favor of life. The jury here was never apprised of several substantial mitigating factors. More important, counsel presented the jury with no reasons to spare petitioner's life and, indeed, strongly intimated that he could think of none.

Despite these strong indicia of unreliability, the District Court found the absence of prejudice as to the *sentencing* phase based primarily on its conclusion that the evidence of petitioner's *guilt* was overwhelming, App. B to Pet. for Cert., p. 3, and the Court of Appeals blithely assumed the jury's role, finding the result "just," 760 F. 2d, at 1092. If the *Strickland* prejudice standard has any vitality at all, it requires a more searching inquiry than that. I dissent.

APPENDIX TO OPINION OF MARSHALL, J., DISSENTING

Your Honor, ladies and gentlemen, since ya'll were selected I might add I haven't taken the opportunity to talk to ya'll a lot but I have been honest and in that honesty I haven't tried in any form or fashion to do anything other than see that the facts in this case were presented and they were very ably presented, there's no question about that.

Now, I knew that when I got involved in this case at the beginning they would be. The question in this case is not the facts. Twenty-nine times I said "no questions." Thirty times I said "no objections" to a witness being excused.

Each and every one of us knows the young girl died. Like Mr. Foster, I have two young children of my own and believe you me that makes it more difficult for me to stand here in front of you all right now, each and every one of you, than it does for Mr. Foster, I dare say. I don't ask you to appreciate that. I don't ask for that at all. I just want to be straight up and honest about this whole thing and where we are all coming from. Each and every one of you in this jury box know before this case started or had some slight idea, that we were going to be at this point today where we are now and the decision was going to come down to the 12 of you and what you determine to be Mr. Messer's fate.

I dare say, and it has been suggested to me, and I say this in all humble candor, by some both here and in Rome that I ought to argue to this jury to leave him alive is a more cruel punishment because he's got to live with it, so I don't know what to say to you. I really don't. I know that at this particular point there is no question in my mind that verdict this jury spoke in this court room today was the truth. I don't contest that at all. The question is when the judge tells you what the law is in this situation and what is considered to make something aggravating circumstances, what is considered to mitigate circumstances, he's also going to tell you that in a situation like this you can almost disregard those and leave it up to yourselves, your gut feeling as to what it is you feel speaks the voice of the community.

Now, the community, a great part of the community, has been here in this court room as potential jurors and as members of the audience, and it concerns Polk County. Interestingly enough Judge Winn told me two weeks ago that he didn't think there would be anyone here by the end of the trial that it had been a long time since there had been a trial like this and the last time a good many years ago he could remember that there just wasn't 10 or 15 people by the time the trial got done with, people were just that uninterested. But that's not true in this situation because people have been

very interested, and very interested right now with what is this community's voice through ya'll going to be.

Unfortunately, I do not agree again with Mr. Foster as to his position that each and every one of you by rendering a verdict that speaks for the death penalty are being brave. In not doing that you're showing people outside of Polk County that you don't know how to deal with people who take the lives of others in Polk County. That's not the issue. Nor is it the bravest thing to do in this situation to vote the death penalty. It would take a heck of a lot more guts to say that there's something in that human being who sits over there, sits over there having to remember what ya'll have just learned about him. There's something that put extent that you choose to use that the law allows each and every one of you to do it. That's an awesome responsibility and I dare say I would rather be over here than in ya'll's seats, because as a parent under these circumstances . . . but that's for ya'll to decide. Please however, as the judge will charge you, the decision then as a group, your decision be it give him life or death is your decision, you need not worry about what happens after that decision as to how it's carried out. That makes it a lot easier as far as the decision is concerned in having to live with it but it's still your decision, and if your decision is life that is a decision that you have come about to make freely and honestly based upon all that you've heard in the case and there might be some reason to leave this man on the face of the earth then hold onto that decision, if not then let it go, but make it your own decision, each and every one of you, don't make it a decision of your friends and neighbors that you just adopt. I dare say 10 years ago had any of you ever pictured yourselves being in this situation and having to make this decision 10 years from then you wouldn't.

Thank you.

JUSTICE BLACKMUN dissents from the denial of the petition for writ of certiorari.